Supreme Court, U.S.
FILED
(1)
No. 04 182 AUG - 4 2004
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In The

Supreme Court of the United States

WALTER DAVID TALLMADGE,

Petitioner,

vs.

MIKE KNOWLES, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did *Stogner v. California*, 539 U.S. 607, 156 L.Ed.2d 544, 123 S.Ct. 2446 (2003), announce a new rule of constitutional law previously unavailable to petitioner and trigger the operation of "safety-valve" provisions in 28 U.S.C. §§ 2254(b)(1)(B) and 2244(d)(1)(C), thereby permitting petitioner to bring a habeas corpus action attacking his state court conviction in federal court, and did the Ninth Circuit Court of Appeals err in denying petitioner a certificate of appealability?

2. Were the issues presented by petitioner in his request for a certificate of appealability alleging that (1) his prosecution for violation of Cal. Penal Code §§ 288(b) and 288.5, after expiration of the six-year limitations period prescribed under Cal. Penal Code § 800, and (2) introduction of evidence for which § 800's limitations period had expired at petitioner's trial, in order to convict petitioner, under the authority of §§ 1101(b) and 1108(b), Cal. Evidence Code and 803(g), Cal. Penal Code fall within the Fourth Category of *ex post facto laws* addressed in *Stogner*, substantive and did these issues present a substantial showing of the denial of a constitutional right and would jurists of reason find it debatable whether the Court of Appeals and district court were correct in their procedural ruling?

3. Did this Court's holding in *Stogner* affect the constitutionality of the admissibility of evidence under California Evidence Code §§ 1101(b) and 1108(b) where those statutory provisions were applied to petitioner via § 803(g)'s retroactivity provision that permitted evidence of sexual acts that allegedly occurred in 1966 and were never charged and where the statute of limitations for

QUESTION PRESENTED – Continued

bringing charges for commission of these acts was three years and did the admissions of this evidence, under §§ 803(g), Cal. Penal Code, 1101(b) and 1108(b), Cal. Evidence Code, constitute the type of "subtle" *ex post facto* violations that this Court held were "no more permissible than overt ones" in *Stogner* and did the district court err in holding that the admissibility of evidence under these sections is not affected by this Court's decision in *Stogner*?

LIST OF PARTIES

WALTER DAVID TALLMADGE is the petitioner.

MIKE KNOWLES, WARDEN, is the Respondent.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Walter David Tallmadge, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit entered in this case on June 21, 2004, and the Order of the United States District Court for the Central District of California, Western Division entered in this case on April 19, 2004, denying petitioner's request for a certificate of appealability.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, dated June 21, 2004, denied petitioner's request for a certificate of appealability. The Judgment and Order of the United States District Court for the Central District of California, Western Division, dated April 19, 2004. The Judgment and Order of the United States District Court for the Central District of California, dated March 29, 2004. The Final Report and Recommendation of the United States Magistrate Judge, dated March 30, 2004.

JURISDICTION

The jurisdiction of the United States District Court was pursuant to 28 U.S.C. § 2254 and 28 U.S.C. § 2253(c). The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked pursuant to 28 U.S.C. § 2253(c) and Fed.R.App.P. 22(b). The jurisdiction of the

United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the Ex Post Facto Clause of the Constitution of the United States, Art. 1, § 10, cl. 1, and 28 U.S.C. §§ 2253, 2244 and 2254.

STATEMENT OF THE CASE

On September 25, 2003, petitioner, Walter David Tallmadge, filed a Petition for Writ of Habeas Corpus in the Eastern District of California. (App. 83-99) It was filed in the Central District of California on October 28, 2003 following transfer. The respondent filed a "Motion to Dismiss Petition for Writ of Habeas Corpus" ("Motion") on January 4, 2004. Petitioner filed "Petitioner's Reply to Respondent's Motion to Dismiss" ("Reply") on February 9, 2004.

Petitioner's "Petition for Writ of Habeas Corpus" ("Petition") collaterally challenged his conviction, following trial by jury, on June 17, 1997 of nine counts of committing a forcible lewd act upon a child under the age of 14 years (Cal. Penal Code § 288(b)), two counts of continuous sexual abuse on a child (Cal. Penal Code § 288.5), one count of rape (Cal. Penal Code § 261(a)(2)), one count of forcible penetration with a foreign object (Cal. Penal Code § 289(a)) and two counts of forcible oral copulation (Cal Penal Code § 289(a)). The jury also found true that petitioner had a prior conviction within the

meaning of California Penal Code §§ 667(b)-(i), 1170.12(a)-(d), and had personally used a firearm during the commission of two of the counts of a forcible lewd act upon a child. The trial court sentenced petitioner to 265 years in state prison on July 8, 1997; sentence imposed by the Los Angeles County Superior Court.

The California Court of Appeals affirmed petitioner's conviction on June 15, 1999. Petitioner filed for review in the California Supreme Court. The petition was denied on September 29, 1999.

In his Petition for Writ of Habeas Corpus, Tallmadge contended that:

1. Count One of the Information unconstitutionally charged petitioner with a crime that was committed beyond the six-year statute of limitations period (Cal. Penal Code § 800). (App. 42)

2. Count Two of the Information unconstitutionally charged petitioner with a crime that was committed beyond the six-year statute of limitations period (Cal. Penal Code § 800). (App. 42)

As to these two counts, petitioner contended that the six-year statute of limitations applicable to violation of §§ 288(b) and 288.5, Cal. Penal Code, Cal. Penal Code § 800 [extended by § 803(g)] had expired in December, 1995 and the prosecution begun [by filing of the Information charging Tallmadge with violations of §§ 288(b) and 288.5, Cal. Penal Code, on March 27, 1996. (App. 55-56)

3. The application of §§ 1101(b) and 1108, Cal. Evidence Code, was unconstitutional, violating the Fourteenth Amendment's Due Process and Equal Protection

clauses and the Ex Post Facto Clause, Art. 1, § 10, cl. 1, as the trial court's application of these statutes allowed evidence of acts for which the limitations periods under §§ 800 and 803(g), Cal. Penal Code, had expired in order to convict petitioner and that were not charged in the Information to come in. (App. 52-53)

4. The trial court erred when it denied petitioner's motion for a mistrial based on testimony that identified defense counsel as a customer of "prostitution" of the prosecution's testifying witness who was the mother of the alleged minor victim.

5. Petitioner received ineffective assistance of counsel because his attorney failed to challenge the first two Counts of the Information as being beyond the statute of limitations and also failed to challenge the application of §§ 1101(b) and 1108 as unconstitutionally permitting the extension of the statute of limitations for uncharged offenses introduced into evidence at petitioner's trial in order to convict petitioner.

Following the filing of Respondent's motion ("Motion") on January 4, 2004 and Petitioner's reply ("Reply") on February 9, 2004, the United States Magistrate Judge submitted his "Report and Recommendation," on March 8, 2004, recommending that the District Court issue an Order adopting the Report and Recommendation; granting the respondent's motion ("Motion"); and entering Judgment denying and dismissing the Petition with prejudice. (App. 19-30) Petitioner filed "Objections To The Report and Recommendation Of United States Magistrate Judge" ("Objections") on March 19, 2004.

On March 30, 2004, the United States Magistrate Judge submitted his "final Report and Recommendation"

to the Honorable Percy Anderson, United States District Judge, in which he recommended that the Petition be dismissed with prejudice. (App. 6-18)

On March 29, 2004, the District Court issued its Order adopting the "Final Report and Recommendation" of the United States Magistrate Judge, granted the Respondent's Motion to Dismiss and on March 30, 2004, entered Judgment denying the Petition and dismissing it with prejudice.

On April 14, 2004, petitioner filed a "Request For Certificate of Appealability" ("COA") in the United States District Court for the Central District of California, Western Division. (App. 59-62) On April 14, 2004, petitioner filed a timely Notice of Appeal from the Order and Judgment of the District Court. On April 19, 2004, the District Court issued its Order denying a COA. (App. 4-5) On June 21, 2004, the United States Court of Appeals for the Ninth Circuit issued an Order denying petitioner's request for a Certificate of Appealability (COA). Petitioner now requests the Supreme Court grant the Petition for Writ of Certiorari to review the Judgment and Orders of the lower courts.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' ORDER DENYING A CERTIFICATE OF APPEALABILITY CONTRAVENES THIS COURT'S DECISION IN *SLACK V. MCDANIEL*, WHERE THIS COURT HELD THAT WHEN A DISTRICT COURT DENIES A HABEAS PETITION ON PROCEDURAL GROUNDS WITHOUT REACHING THE PRISONER'S UNDERLYING CONSTITUTIONAL CLAIM, A COA SHOULD ISSUE WHEN THE PRISONER SHOWS, AT LEAST, THAT JURISTS OF REASON WOULD FIND IT DEBATABLE (1) WHETHER THE PETITION STATES A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND (2) WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL RULING, AND FAILED TO GIVE RETROACTIVE EFFECT TO A STATUTORY CONSTRUCTION DECISION.

In *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), this Court held that "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 529 U.S. at 484. The Court went on to say that 28 U.S.C. § 2253(c) mandates that both showings be made before the Court of Appeals may entertain the appeal. 529 U.S. at 585.

The Court of Appeals denied petitioner's request for a COA, citing 28 U.S.C. § 2244(d)(1) without any analysis. The Court of Appeals was likely referencing the one-year time limitation for bringing a habeas action under the Antiterrorism And Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2244(d)(1). However, the so-called "safety valve" provisions found in 28 U.S.C. § 2244(d)(1(C) (as amended by AEDPA § 101) are exceptions to the one-limitation on bringing a collateral attack on a state court conviction imposed by § 2244(d)(1)(A). Those "safety-valve" provisions contained in § 2244(d)(1)(B), (C) and (D) dictate that the one-year period of limitation applicable to a writ of habeas corpus by a person in custody pursuant to the judgment of a State court shall run from the latest of –

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(B), (C) and (D). (App. 33-36)

In the instant case, the constitutional right asserted was initially recognized by the Supreme Court in *Stogner v. California*, 539 U.S. 607, 156 L.Ed.2d 544, 123 S.Ct. 2446 (2003), where the Court found the retroactivity

provision contained in Cal. Penal Code § 803(g), that permitted otherwise time-barred criminal prosecutions, unconstitutional. The court, in construing the California statute and finding it unconstitutional, announced a new rule of constitutional law applicable to the petitioner that was not previously available to him.

In its statutory construction analysis in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994), this Court found that statutory construction decisions are always retroactive on the initial collateral review petition. As the Court clearly stated:

> "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."

Rivers, supra, 511 U.S. at 312, 313. And in a companion case to *Rivers, Landgraf v. USI Film Products*, 511 U.S. 244, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994), the Court said:

> "As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic [footnote omitted]. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. [footnote omitted] For that reason, the 'principle that the

> legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" (citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 842-844, 855-856, 108 L.Ed.2d 842, 110 S.Ct. 1570 (1990) (Scalia, J., concurring).

511 U.S. at 265.

The statute at issue in the instant case, Cal. Penal Code § 803(g), as construed by this Court in *Stogner*, is particularly offensive as it gave retroactive effect to offenses for which the statute of limitations had expired even prior to its own enactment.

> "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *United States v. Security Industrial Bank*, 459 U.S. 70, 79, 74 L.Ed.2d 235, 103 S.Ct. 407 (1982).

II. THE HOLDING OF THIS COURT IN *STOGNER* AFFECTED THE CONSTITUTIONALITY OF THE ADMISSIBILITY OF EVIDENCE UNDER CALIFORNIA EVIDENCE CODE §§ 1101(g) AND 1108, WHERE THESE PROVISIONS COULD ONLY BE APPLIED TO PETITIONER VIS-À-VIS CAL. PENAL CODE § 803(g)'s RETROACTIVITY PROVISION, WHICH APPLICATION CONSTITUTED AN IMPERMISSIBLE "SUBTLE" EX POST FACTO CLAUSE VIOLATION.

Cal. Penal Code § 803(g) also retroactively allowed the operation of California evidence statutes, specifically Cal. Evidence Code §§ 1101(b) and 1108, to end-run the statute

of limitations authorized by Cal. Penal Code § 800, and this was accomplished by "alter[ing] the legal rules of evidence" and allowing courts to "receive[s] less, or different testimony, than the law required at the time of the offence, in order to convict the offender" (citing *Stogner, supra*, 156 L.Ed. at 554). This statute also permitted evidence to be introduced at trial of conduct that occurred prior to the enactment of § 800's six-year limitations period in 1987 and long before the enactment of § 803(g) in 1994, whose retroactive effect was itself "interpreted" by the California Court of Appeal, in 2003, in *People v. Texas*, 21 Cal.4th 737, 88 Cal.Rpt.3d 363 (Cal. App. 5 Dist. 2003); holding the 1996 amendment to § 803(g) to be a "clarification" of the statute retroactively and not an amendment.

The significance of the preceding discussion to the instant case is two-fold. First, the constitutional right asserted by petitioner, in his Request for a Certificate of Appealability, was violation of the Constitution's Ex Post Facto Clause, Art. 1, § 10, cl. 1. The question was whether petitioner's prosecution for violations of California sex crime statutes and the introduction of evidence of crimes for which the statute of limitations had expired, in order to convict petitioner, authorized pursuant to the provisions of § 803(g), Cal. Penal Code, and §§ 1101(b) and 1108, Cal. Evidence Code, violate the Constitution's Ex Post Facto Clause, Art. 1, § 10, cl. 1, fall within the Fourth category of ex post facto law ("every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender") examined by the Court in *Stogner, supra*; 156 L.Ed. at 554 (citing *Calder v. Bull*, 3 Dall. 386 at 390).

The six-year statute of limitations authorized by § 800, Cal. Penal Code, had expired when § 803(g)'s retroactivity provision permitted evidence to be introduced, relating to alleged sexual acts with **Michelle Z.**, that occurred in 1987, more than six years before § 803(g) was enacted (January 1, 1994); **Deborah B.**, that allegedly occurred in 1966 (when the California statute of limitations for sex crimes was three years) and which were never charged [the alleged acts having occurred 27 years prior to petitioner's trial for violation of Cal. Penal Code §§ 288(b) and 288.5, et al.). Moreover, the incidents described were based solely on the witness' memory. Nothing was written down and no police records were prepared. The six-year statute of limitations had also expired for the alleged sex acts that occurred between petitioner and **Marylee M.**, in 1985; **Susana J.**, in 1984; and **Danielle T.** in 1982. In the latter instance, the complaint was filed twelve (12) years **after** the expiration of the statute of limitations authorized by § 800, Cal. Penal Code.

The application of §§ 1101(b) and 1108, Cal. Evidence Code, authorizing the introduction of this evidence at petitioner's trial, could not have occurred but for the operation of Cal. Penal Code § 803(g)'s retroactivity provision; which allowed prosecution of crimes for which the statute of limitations had expired. This Court, addressing occurrences such as those referenced by petitioner, said:

> "[S]ubtle **ex post facto** violations are no more permissible than overt ones."

Stogner, supra, 156 L.Ed.2d at 555 [citing *Cummings v. Missouri*, 4 Wall. 277, 329, 18 L.Ed. 356 (1867) (The **Ex Post Facto** Clause "cannot be evaded by the loss in which

the power of the State is exerted").] This Court, in *Stogner*, noted that:

> "[A] statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict [citing *United States v. Marion*, 404 U.S. 307, 322, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971).] And that judgment typically rests, in large part, upon evidentiary concerns – for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable [citations omitted]. Indeed, this Court once described statutes of limitations as creating 'a presumption which renders proof unnecessary.'" [citations omitted]

Stogner, supra, 156 L.Ed.2d at 254. The introduction of this evidence in the instant case, although prosecution for the acts alleged was time-barred, added to the quantum of evidence used to convict the petitioner; thereby allowing him to be convicted and punished on the basis of alleged acts that could not be the basis of a direct prosecution because they were time-barred. As this Court said in *DeVeau v. Braisted*, 363 U.S. 144, 160, 4 L.Ed.2d 1109, 80 S.Ct. 1146 (1960):

> "The mark of an **ex post facto** law is the imposition of what can fairly be designated punishment for past acts." *Id.*

Petitioner asserts that Cal. Penal Code § 803(g) and Cal. Evidence Code §§ 1101(b) and 1108 are unconstitutional both because they were enacted after expiration of a previously applicable limitations period and applied to revive previously time-barred prosecutions [§ 803(g)] and because they "alter[ed] the legal rules of evidence [adding

to the quantum of evidence], and receive[d] less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Stogner, supra*, 156 L.Ed.2d at 554. The State was able to add to the quantum of evidence introduced at petitioner's trial, in order to convict him, through this "subtle" **ex post facto** violation by expediently exerting its power "in a different form." *Stogner, supra*, 156 L.Ed.2d at 555 [citing *Cummings v. Missouri*, 4 Wall. 277, 18 L.Ed. 356 (1867).]

III. THE ISSUES PRESENTED BY PETITIONER IN HIS REQUEST FOR A CERTIFICATE OF APPEALABILITY PRESENTED A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE COURT OF APPEALS AND DISTRICT COURT WERE CORRECT IN THEIR PROCEDURAL RULING.

Second, petitioner sought appellate review of the District Court's conclusion that his conviction is not affected by this Court's decision in *Stogner v. California*, 539 U.S. 607, 156 L.Ed.2d 544, 123 S.Ct. 2446 (2003), because this Court found that § 803(g), Cal. Penal Code, "was only constitutional when it was 'applied to revive a previously time-barred prosecution.'" (Report and Recommendation of United States Magistrate Judge, p. 8) ("MRR") (App. 27). However, the Supreme Court also stated that:

> "In finding that California's law falls within the literal terms of Justice Chase's second category, we do not deny that it may fall within another category as well. Justice Chase's fourth category,

> for example includes only 'law that alters the legal rules of evidence and receives less, or different testimony, than the law required at the time of the offence, in order to convict the offender.'"

Stogner, 156 L.Ed.2d at 554 (citing *Calder v. Bull*, 3 Dall. 386 at 390).

The District Court failed to analyze the constitutionality of Cal. Penal Code § 803(g)'s retroactivity provision, which permitted evidence relating to sexual acts with **Michelle Z.**, that allegedly occurred sometime in 1987; more than six years prior to the enactment of § 803(g) (January 1, 1994), and clearly outside the six-year limitations' period authorized by Cal. Penal Code § 800, under the Fourth category of **ex post facto** laws addressed by this Court in *Stogner*. The District Court also failed to analyze petitioner's challenge to the constitutionality of the application of §§ 1101(b) and 1108, Cal. Evidence Code, in relation to their application via § 803(g)'s retroactivity provision.

The application of §§ 1101(b) and 1108 at petitioner's trial, permitted by the retroactivity provision of § 803(g), Cal. Penal Code, that allowed prosecution for alleged acts for which the statute of limitations had previously expired, permitted evidence of alleged sexual acts between petitioner and **Deborah B.** that supposedly occurred in 1966 (although they were never charged or prosecuted) when the statute of limitations for bringing a prosecution for those acts was three years in the State of California. The alleged acts testified to at petitioner's trial occurred twenty-seven (27) years prior to the trial and the incidents that were described by the witness were based solely on her memory. As this Court said in *Stogner*:

> "Memories fade and witnesses can die or disappear . . . Such problems can plague child abuse cases, where recollection after so many years may be uncertain, and 'recovered' memories faulty, but may nonetheless lead to prosecutions that destroy families. . . . Regardless, a constitutional principle must apply not only in child abuse cases, but in every criminal case."

Stogner, supra, 156 L.Ed.2d at 564-565.

Further, the introduction of evidence of alleged sexual acts between petitioner and **Deborah B.**, permitted by the application of Cal. Evidence Code §§ 1101(b) and 1108 and authorized by petitioner's prosecution under § 803(g), Cal. Penal Code, constitute the kind of "subtle" **ex post facto** violations that are "no more permissible than overt ones." *Stogner, supra*, 156 L.Ed.2d at 555 (citing *Collins v. Youngblood*, 497 U.S. 37, 46 (1990)).

The six-year statute of limitations for prosecution of sexual acts, § 800, Cal. Penal Code, that allegedly occurred between petitioner and **Marylee M.** (in 1985); **Susana J.** (in 1984); and **Danielle T.** (in 1982), had expired prior to the enactment of § 803(g), Cal. Penal Code, in January 1994. It is interesting that the complaint alleging sexual acts with **Danielle T.** was filed with the authorities twelve (12) years after the expiration of the limitations period authorized by § 800, Cal. Penal Code, and several years after the enactment of § 803(g) in 1994.

Petitioner asserts that the application of §§ 1101(b) and 1108, Cal. Evidence Code, and § 803(g), Cal. Penal Code, that added to the quantum of evidence used to convict him of the offenses charged, violated the Constitution's **Ex Post Facto** Clause, Art. 1, § 10, cl. 1, and the

Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. Petitioner asserts that the "subtle" application of §§ 1101(b) and 1108(b), Cal. Evidence Code, under a prosecution authorized by § 803(g), Cal. Penal Code, that permitted evidence of acts for which the limitations period for their prosecution had expired, in order to convict him, falls squarely within Justice Chase's fourth category of **ex post facto** laws, set forth by this Court in *Stogner*, by authorizing the courts to "receiv[e] evidence . . . which the courts of justice would not [previously have] admit[ted] as sufficient proof of a crime." *Stogner, supra*, 156 L.Ed.2d at 554.

It is also worth noting that this Court did not decide that extensions of unexpired statutes of limitations did not violate the **Ex Post Facto** Clause, as the District Court held, but merely noted that "[e]ven where courts have upheld extensions of unexpired statutes of limitations (extensions that our holding today does not affect (citations omitted), they have consistently distinguished situations where limitations periods have expired.") *Stogner, supra*, 156 L.Ed.2d at 556.

The petitioner contends that 28 U.S.C. § 2244(b)(1)(A)'s one-year period of limitation, for filing a habeas corpus petition in federal court, runs, in the instant case, from the date of this Court's decision in *Stogner v. California, supra*, 539 U.S. 607, 156 L.Ed.2d 544, 123 S.Ct. 2446 (2003), which was June 26, 2003, and that 28 U.S.C. § 2244(b)(1)(C) was the applicable section of the habeas statute, as amended by the AEDPA, to be applied by the lower court. *Stogner* is a statutory construction decision in which this Court announced a new constitutional rule of law barring the application of the California statute,

§ 803(g), Cal. Penal Code, to the prosecution of the accused, where the statute would have permitted the resurrection of an otherwise time-barred criminal prosecution and where the statute had been enacted after the preexisting limitations periods for the prosecution had expired.

It is petitioner's contention that the habeas corpus petition should not have been dismissed with prejudice on statute of limitations grounds, for the reasons stated, and that a certificate of appealability (COA) should have issued; petitioner having satisfied the showing required under *Slack v. McDaniel, supra*, 529 U.S. 473, 585, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), that when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, "[a] COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 529 U.S. at 584.

Petitioner submits that he made the requisite showings and that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right [which showing was not addressed by the lower courts in denying the COA] and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. As to the latter showing, petitioner demonstrated that, (1) 28 U.S.C. § 2244(d)(1)(C) is the applicable section of the habeas statute, as amended by the AEDPA, to be applied in the instant case, (2) *Stogner v. California*, 539 U.S. 607 (2003), is a statutory construction decision in which the Supreme Court announced a new constitutional rule of law, and (3)

Stogner must be given retroactive effect on petitioner's initial collateral review petition; where the Supreme Court construed Cal. Penal Code, § 803(g) and found the statute unconstitutional as applied and where petitioner filed his habeas petition within one year of the Court's decision in *Stogner*.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the United States Court of Appeals for the Ninth Circuit ordering the issuance of a COA to review the Order and Judgment of the District Court issued April 19, 2004.

Dated at Milwaukee, Wisconsin, this 4th day of August, 2004.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner
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Milwaukee, WI 53211
(414) 961-0802

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALTER DAVID TALLMADGE, Petitioner-Appellant, v. MIKE KNOWLES, Warden, Respondent-Appellee.	No. 04-55726 D.C. No. CV-03-07701-PA Central District of California, Los Angeles ORDER (Filed Jun. 21, 2004)

Before: RYMER and MCKEOWN, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2244(d)(1).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WALTER DAVID TALLMADGE, Petitioner,	)	No. CV 03-7701-PA (PLA)
v.	)	**JUDGMENT**
MIKE KNOWLES, Warden, Respondent.	)	(Filed Mar. 29, 2004)

Pursuant to the order adopting the magistrate judge's final report and recommendation, IT IS ADJUDGED that the petition in this matter is denied and dismissed with prejudice.

DATED: March 26, 2004 /s/ Percy Anderson
HONORABLE
PERCY ANDERSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WALTER DAVID TALLMADGE, Petitioner, v. MIKE KNOWLES, Warden, Respondent.	No. CV 03-7701-PA (PLA) **ORDER ADOPTING MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION** (Filed MAR. 29, 2004)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the magistrate judge's final report and recommendation, and the objections to the report and recommendation that have been field herein. The Court agrees with the recommendations of the magistrate judge.

ACCORDINGLY, IT IS ORDERED:

1. The final report and recommendation is adopted.
2. Respondent's Motion to Dismiss is granted.
3. Judgment shall be entered consistent with this order.
4. The clerk shall serve this order and the judgment on all counsel or parties of record.

DATED: March 26, 2004

/s/ Percy Anderson
HONORABLE
PERCY ANDERSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WALTER DAVID TALLMADGE, Petitioner, v. MIKE KNOWLES, Warden, Respondent.	No. CV 03-7701-PA (PLA) ORDER DENYING CERTIFICATE OF APPEALABILITY (Filed Apr. 19, 2004)

On April 14, 2004, petitioner filed a timely notice of appeal from the Judgment dismissing the petition for writ of habeas corpus, entered March 29, 2004, and a request for a certificate of appealability.

An appeal may not be taken from the denial by a district judge of an application for a writ of habeas corpus in which the detention complained of arises out of process issued by a state court "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Here, the Court has adopted the Magistrate Judge's finding and conclusion that the Petition is time barred under 28 U.S.C. § 2244(d). Thus, the Court's determination of whether a certificate of appealability should issue here is governed by the Supreme Court's decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), where the Supreme Court held that "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue

when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 529 U.S. at 484. As the Supreme Court further explained:

> Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

529 U.S. at 485.

Here, the Court finds that petitioner has failed to make the requisite showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" with respect to the time bar issue.

THEREFORE, pursuant to 28 U.S.C. § 2253, petitioner's request for a Certificate of Appealability is **DENIED.**

DATED: April 16, 2004

/s/ Percy Anderson
HONORABLE
PERCY ANDERSON
UNITED STATES
DISTRICT JUDGE

Presented by:

/s/ Paul L. Abrams
PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WALTER DAVID TALLMADGE, Petitioner, v. MIKE KNOWLES, Warden, Respondent.	No. CV 03-7701-PA (PLA) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Mar. 29, 2004)

This Final Report and Recommendation is submitted to the Honorable Percy Anderson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be dismissed with prejudice.

I

SUMMARY OF PROCEEDINGS

On June 17, 1997, a Los Angeles County jury found petitioner guilty of nine counts of committing a forcible lewd act upon a child under the age of 14 years (Cal. Penal Code § 288(b)), two counts of continuous sexual abuse on a child (Cal. Penal Code § 288.5), one count of rape (Cal. Penal Code § 261(a)(2)), two counts of forcible oral copulation (Cal. Penal Code § 288a(c)), and one count of forcible penetration with a foreign object (Cal. Penal Code § 289(a)). (Appendix to Petition ("App. Pet.") at 1-2.) The jury also found true that petitioner had a prior conviction

within the meaning of California Penal Code §§ 667(b)-(i), 1170.12(a)-(d), and had personally used a firearm during the commission of two of the counts of a forcible lewd act upon a child. (App. Pet. at 2.) On July 8, 1997, the trial court sentenced petitioner to 265 years in state prison. (App. Pet. at 1.)

The California Court of Appeal affirmed petitioner's conviction on June 15, 1999. (Pet. at 3.)[1] Petitioner filed a petition for review in the California Supreme Court. The petition was denied on September 29, 1999. (App. Pet. at 95.)

Petitioner filed the instant Petition in the Eastern District of California on September 25, 2003, and it was filed in the Central District of California following transfer on October 28, 2003. Respondent filed a "Motion to Dismiss Petition for Writ of Habeas Corpus" ("Motion") on January 4, 2004. Petitioner filed "Petitioner's Reply to Respondent's Motion to Dismiss" ("Reply") on February 9, 2004. The Motion is deemed submitted and is ready for a decision.

II

STATEMENT OF FACTS

As the Court's disposition of this matter does not depend on a factual analysis of petitioner's underlying state court conviction, the Court simply notes that petitioner was

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[1] Both petitioner and respondent lodged copies of the California Court of Appeal's decision. As the stamped file date is illegible on both copies, the Court relies on the date petitioner provides in the Petition.

convicted in the Los Angeles County Superior Court of various counts of sexual acts with minors. (Pet. at 3.)

III

PETITIONER'S CONTENTIONS

1. Count One of the Information unconstitutionally charged petitioner with a crime that was committed beyond the six year statute of limitations period (Cal. Penal Code § 800). (Pet. at 5-6.)

2. Count Two of the Information unconstitutionally charged petitioner with a crime that was committed beyond the six year statute of limitations period (Cal. Penal Code § 800). (Pet. at 6-8.)

3. The trial court violated petitioner's right to Due Process and Equal Protection of the law when it allowed "evidence of other crimes not charged in the Information that were beyond the statute of limitations" to come in under California Evidence Code §§ 1101(b) and 1108. (Pet. at 8-12.)

4. The trial court erred when it denied petitioner's motion for a mistrial based on testimony that identified defense counsel as a customer of "prostitution." (Pet. at 13-14.)

5. Petitioner received ineffective assistance of counsel because his attorney failed "to challenge the first two Counts of the Information as being beyond the statute of limitations" and "for failure to challenge the application of §§ 1101(b) and 1108(a) as unconstitutionally permitting the extension of the statute of limitations . . . " (Pet. at 14-16.)

IV

THE PETITION IS BARRED BY THE STATUTE OF LIMITATIONS

Respondent argues, *inter alia*, that the Petition is barred by the AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d)(1). (Motion ("Mot.") at 4-7.)[2]

a. The Limitations Period

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in reviewing the Petition. *See Lindh v. Murphy,* 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

The AEDPA imposes a one-year period of limitation for prisoners in state custody to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1) ("the statute of limitations"). That section provides:

> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

[2] As the Court resolves respondent's Motion to Dismiss on statute of limitations grounds, it will not address the other grounds raised by respondent in its Motion.

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

28 U.S.C. § 2244(d)(1)(A), (B), (C), (D).

The word "judgment" in subparagraph (A) of § 2244(d)(1) refers to the judgment of conviction and sentence, and "direct review" refers to direct appellate review of that judgment. *Redd v. McGrath*, 343 F.3d 1077, 1081 (9th Cir. 2003). Subparagraph (A) does not refer to an administrative decision, such as that of a Board of Prison Terms. *Id.* Insofar as the Petition alleges that petitioner's conviction in 1997 was unconstitutional, that conviction became, final for purposes of the limitations period at the "conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court . . . ". *Wixom v. Washington*, 264 F.3d 894, 897-98 (9th Cir. 2001) (citation omitted), *cert. denied*, 534 U.S. 1143 (2002).

Under § 2244(d)(1)(A), the process of direct review does not conclude until either the United States Supreme Court has denied review, or, if no petition for certiorari has been filed, the ninety-day period for filing a petition for

certiorari has expired. *See Tillema v. Long,* 253 F.3d 494, 498 (9th Cir. 2001); *Bowen v. Roe,* 188 F.3d 1157, 1158-59 (9th Cir. 1999). Here, petitioner's conviction became final on December 28, 1999, which was the last day of the 90-day period after the California Supreme Court denied his petition for review during which a petition for certiorari could have been filed. *See Bowen,* 188 F.3d at 1159 (state court judgment becomes final after expiration of 90-day period for petitioning United States Supreme Court for certiorari). Therefore, petitioner had one year from December 28, 1999, in which to file his federal habeas corpus petition. Absent any statutory or equitable tolling, petitioner had until December 28, 2000, to file a habeas petition in federal court. *See* 28 U.S.C. § 2244(d). Petitioner filed the instant Petition on September 25, 2003, nearly three years after his conviction became final.

b. Statutory Tolling

The running of the AEDPA is "statutorily tolled" while a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). This provision tolls the statute for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Thus, in California, the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge. *See Nino v. Galaza,* 183 F.3d 1003, 1006 (9th Cir. 1999). For the periods of time *between* the filing of the state habeas petitions, statutory tolling is only available when those petitions comprise one complete round of the

state's appellate review process. *Tillema*, 253 F.3d at 502. A petitioner is not "entitled to tolling during the interval period between the completion of one round of state collateral review and the commencement of a second round of review." *King v. Roe*, 340 F.3d 821, 823 (9th Cir. 2003); *see also Biggs v. Duncan*, 339 F.3d 1045 (9th Cir. 2003). Additionally, the statute of limitations is not tolled between the time a final decision is issued on direct review and the time the first state collateral challenge is filed, because there is no case "pending" during that time. *See Nino*, 183 F.3d at 1006. Statutory tolling also does not apply during the pendency of a federal habeas petition. *See Duncan v. Walker*, 533 U.S. 167, 181, 182, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

Here, petitioner does not contend that he filed any habeas corpus petitions with the state that would toll all or part of the limitations period, nor does he provide any other facts that would demonstrate that he is eligible for statutory tolling.

c. Equitable Tolling

Petitioner has not offered any facts that would entitle him to equitable tolling of the statute of limitations period. The Ninth Circuit will permit equitable tolling of the AEDPA's limitations period "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1999) (petitioner's mental incompetence rendered him unable to assist counsel). When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be

appropriate. *Id.*; *Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir. 1999). In *Whalem/Hunt v. Early,* 233 F.3d 1146, 1148 (9th Cir. 2000), the court found that lack of AEDPA materials in the prison law library, coupled with the prisoner's ignorance of the AEDPA, could enable a prisoner to avoid the limitations bar. *See also Miles,* 187 F.3d at 1107 (prison officials' delay in issuing filing fee check and in sending the petition to the court justified tolling). According to the information petitioner has provided in his Petition and Reply, he does not qualify for equitable tolling of the statute of limitations.

d. 28 U.S.C. § 2244(d)(1)(B), (C) and (D).

Petitioner contends that his Petition is timely because it falls within the provisions of 28 U.S.C. § 2244(d)(1)(B), (C) and (D). (Reply at 3.) He contends that the United States Supreme court's decision in *Stogner v. California,* ___ U.S. ___, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), removed a State created impediment, gave petitioner a retroactively applied constitutional right, and made it possible for petitioner to discover the factual predicate of his claim. (Reply at 4-5.) Petitioner further contends that because *Stogner* was not decided until June 26, 2003, petitioner had until June 26, 2004, to file a timely petition under the AEDPA. (Reply at 5.)

Petitioner's reliance on *Stogner* is misplaced. In *Stogner,* the United States Supreme Court held that California Penal Code section 803(g),[3] which effectively

[3] "Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any

(Continued on following page)

extended the statute of limitations for certain sexual offenses (including those of which petitioner was convicted), was unconstitutional because it violated the Ex Post Facto Clause of the Constitution. The Court specifically found that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is *applied to revive a previously time-barred prosecution*." *Stogner,* 123 S.Ct. at 2461 (emphasis added).

California Penal Code section 803(g) was enacted as a "special supplementary statute of limitations for certain sex crimes against minors." *People v. Robertson,* 113 Cal.App.4th 389, 392, 6 Cal.Rptr.3d 363 (Cal.App. 5 Dist. 2003). The statute as originally enacted did not expressly state whether or not the statute was retroactive. However, in 1996, the statute was amended to expressly state that it was retroactive. The statute provided that "a pleading could be filed within one year of a qualifying report even where the defendant acquired a statute of limitations defense before 1994," when it was first enacted.[4] *Id.* at 392.

The Supreme Court in *Stogner* held that the 1996 version of section 803(g) violates the constitution's Ex Post Facto Clause when it is applied to individuals who otherwise would have been safe from prosecution because California's six year statute of limitations had already run. (*See* Cal. Penal Code § 800, providing that " . . . prosecution for an offense punishable by imprisonment in the

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age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5." Cal. Penal Code § 803(g).

[4] California Penal Code section 803(g), as originally enacted, took effect on January 1, 1994. *Robertson,* 113 Cal.App.4th at 392.

state prison for eight years or more shall be commenced within six years after commission of the offense.") The *Stogner* Court reaffirmed the notion that "where a complete defense has arisen under a statute of limitations, it cannot be taken away by a subsequent repeal thereof." *Stogner,* 123 S.Ct. at 2453 (internal citations omitted).

The Court distinguished the application of the statute to individuals who had not yet acquired a defense under the statute of limitations as of the time of the enactment of the statute, from those whose crimes were already time-barred when section 803(g) was passed. *Id.* at 2453-54. The Court found that the statute was only unconstitutional when it was "applied to revive a previously time-barred prosecution." The Court opined that its decision did not affect previous law that found that extensions of unexpired statutes of limitations do not violate the Ex Post Facto Clause. *Id.*

Petitioner was charged with a violation of California Penal Code Section 288(b), forcible lewd act upon a child, that was alleged to have occurred "on or about December 23, 1989." (App. Pet. at 5.) Petitioner was also charged with a violation of California Penal Code Section 288.5, continuous sexual abuse, which was alleged to have occurred "on and between December 24, 1989 and June 30, 1991."[5] (App. Pet. At 5.) In both instances, California's six year statute of limitations would not have expired until December 1995. (Pet. at 6, 7.) Because California Penal Code Section 803(g) took effect on January 1, 1994, and

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[5] Petitioner does not contend that any of the other thirteen counts he was convicted of were outside the statute of limitations (Cal. Penal Code § 800). Therefore, the Court will not address the application of *Stogner* to those counts.

petitioner had not yet acquired a defense under the statute of limitations as of that date, his conviction is not affected by the Supreme Court's decision in *Stogner.*

Petitioner has no basis to rely on *Stogner* to justify his late filing of his habeas corpus petition, as that opinion neither removed a State created impediment, gave petitioner a retroactively applied constitutional right, nor made it possible for petitioner to discover the factual predicate of any of the claims in his Petition, *i.e.*, Grounds One through Five.[6] 28 U.S.C. §2244(d)(1)(B), (C) and (D).

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[6] As to Ground Three of the Petition (the admission of evidence under California Evidence Code §§ 1101(b) and 1108), *Stogner* does not aid petitioner in overcoming the one year statute of limitations. The Court's holding in *Stogner* specifically concerned the extension of the statute of limitations. The Court's holding in *Stogner* specifically concerned the extension of the statute of limitations. It did not affect the admissibility of evidence at trial. *See Stogner,* 123 S.Ct. at 2461. Furthermore, in California "no specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible" under California Evidence Code section 108. *People v. Pierce,* 104 Cal.App.4th 893, 900, 128 Cal.Rptr.2d 397 (Cal.App. 2 Dist. 2002) (holding that a 23-year old rape conviction was not too old to demonstrate defendant's propensity); *see also People v. Branch,* 91 Cal.App.4th 274, 284-85, 109 Cal.Rptr.2d 870 (Cal.App. 1 Dist. 2001). As the admissibility of evidence under California Evidence Code section 1108 is not determined by the statute of limitations, *Stogner* does not affect petitioner's claim in Ground Three of the Petition.

Grounds Four and Five of the Petition (*i.e.*, that it was error to not declare a mistrial, and ineffective assistance of counsel) are also not affected by *Stogner.* The factual and legal predicate for Ground Four existed at the time of petitioner's conviction, yet petitioner waited over three years to bring that claim to federal court. Ground Five, which alleged ineffective assistance of trial counsel for not raising the statute of limitations issue at trial, also does not remedy petitioner's untimely filing, as that claim relies on *Stogner,* and falls with petitioner's *Stogner* claim.

Therefore, petitioner's Petition is untimely and barred under the AEDPA's one year statute of limitations.[7]

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[7] On March 22, 2004, petitioner filed his Objections to the Report and Recommendation. Petitioner objects to the Court's finding that he "has not acquired a defense under the statute of limitations." (Objections at 2.) The Court reiterates the fact that although petitioner's six year statute of limitations would have expired in December 1995, California Penal Code § 803(g) went into effect on January 1, 1994. *See Robertson,* 113 Cal.App.4th at 392-94. The effect of Penal Code § 803(g) was to extend petitioner's statute of limitations. Although petitioner alleges that § 803(g) did not take effect until "June 30, 1997" (Objections at 3), the California courts have determined that the effective date of § 803(g) was January 1, 1994, not January 1, 1997. *See Robertson,* 113 Cal.App.4th at 392-94 (affirming that the 1996 amendment to § 803(g) was a clarification of, not a change to, the original version of § 803(g) from 1994). *See also People v. Frazer,* 21 Cal.4th 737, 982 P.2d 180, 88 Cal.Rptr.2d 312 (1999), abrogated by *Stogner,* 123 S.Ct. 2446. Because California Penal Code § 803(g) was enacted before petitioner's statute of limitations had expired, the holding in *Stogner* is not applicable to petitioner's claims. *Stogner,* 123 S.Ct. at 2461 (holding that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution).

Petitioner also objects to the Court's finding that Ground Three was not affected by *Stogner.* (Objections at 4.) Petitioner repeatedly cites to dicta in *Stogner* for the proposition that certain evidence admitted at trial was unconstitutionally admitted. (Objections at 4-7.) This Court, however, may not grant a petition for habeas corpus based on dicta. 28 U.S.C. § 2254(d) (a federal court may not grant a writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*). Such is not the case here.

The remainder of petitioner's Objections are adequately addressed herein.

V

RECOMMENDATION

It is recommended that the District Court issue an Order: (1) adopting this Final Report and Recommendation; (2) granting respondent's Motion to Dismiss; and (3) entering Judgment denying and dismissing the Petition with prejudice.

DATED: March 24, 2004

/s/ Paul L. Abrams
PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WALTER DAVID TALLMADGE, Petitioner, v. MIKE KNOWLES, Warden, Respondent.	No. CV 03-7701-PA (PLA) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Mar. 8, 2004)

This Report and Recommendation is submitted to the Honorable Percy Anderson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be dismissed with prejudice.

I
SUMMARY OF PROCEEDINGS

On June 17, 1997, a Los Angeles County jury found petitioner guilty of nine counts of committing a forcible lewd act upon a child under the age of 14 years (Cal. Penal Code § 288(b)), two counts of continuous sexual abuse on a child (Cal. Penal Code § 288.5), one count of rape (Cal. Penal Code § 261(a)(2)), two counts of forcible oral copulation (Cal. Penal Code § 288a(c)), and one count of forcible penetration with a foreign object (Cal. Penal Code § 289(a)). (Appendix to Petition ("App. Pet.") at 1-2.) The jury also found true that petitioner had a prior conviction within the meaning of California Penal Code §§ 667(b)-(i), 1170.12,(a)-(d), and had personally used a firearm during

the commission of two of the counts of a forcible lewd act upon a child. (App. Pet. at 2.) On July 8, 1997, the trial court sentenced petitioner to 265 years in state prison. (App. Pet. at 1.)

The California Court of Appeal affirmed petitioner's conviction on June 15, 1999. (Pet. at 3.)[1] Petitioner filed a petition for review in the California Supreme Court. The petition was denied on September 29, 1999. (App. Pet. at 95.)

Petitioner filed the instant Petition in the Eastern District of California on September 25, 2003, and it was filed in the Central District of California following transfer on October 28, 2003. Respondent filed a "Motion to Dismiss Petition for Writ of Habeas Corpus" ("Motion") on January 4, 2004. Petitioner filed "Petitioner's Reply to Respondent's Motion to Dismiss" ("Reply") on February 9, 2004. The Motion is deemed submitted and is ready for a decision.

II
STATEMENT OF FACTS

As the Court's disposition of this matter does not depend on a factual analysis of petitioner's underlying state court conviction, the Court simply notes that petitioner was convicted in the Los Angeles County Superior Court of various counts of sexual acts with minors. (Pet. at 3.)

---

[1] Both petitioner and respondent lodged copies of the California Court of Appeal's decision. As the stamped file date is illegible on both copies, the Court relies on the date petitioner provides in the Petition.

III
PETITIONER'S CONTENTIONS

1. Count One of the Information unconstitutionally charged petitioner with a crime that was committed beyond the six year statute of limitations period (Cal. Penal Code § 800). (Pet. at 5-6.)

2. Count Two of the Information unconstitutionally charged petitioner with a crime that was committed beyond the six year statute of limitations period (Cal. Penal Code § 800). (Pet. at 6-8.)

3. The trial court violated petitioner's right to Due Process and Equal Protection of the law when it allowed "evidence of other crimes not charged in the Information that were beyond the statute of limitations" to come in under California Evidence Code §§ 1101(b) and 1108. (Pet. at 8-12.)

4. The trial court erred when it denied petitioner's motion for a mistrial based on testimony that identified defense counsel as a customer of "prostitution." (Pet. at 13-14.)

5. Petitioner received ineffective assistance of counsel because his attorney failed "to challenge the first two Counts of the Information as being beyond the statute of limitations" and "for failure to challenge the application of §§ 1101(b) and 1108(a) as unconstitutionally permitting the extension of the statute of limitations . . . " (Pet. at 14-16.)

IV
THE PETITION IS BARRED BY THE STATUTE OF LIMITATIONS

Respondent argues, *inter alia*, that the Petition is barred by the AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d)(1). (Motion ("Mot.") at 4-7.)[2]

a. The Limitations Period

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in reviewing the Petition. *See Lindh v. Murphy,* 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

The AEDPA imposes a one-year period of limitation for prisoners in state custody to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1) ("the statute of limitations"). That section provides:

> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

[2] As the Court resolves respondent's Motion to Dismiss on statute of limitations grounds, it will not address the other grounds raised by respondent in its Motion.

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

28 U.S.C. § 2244(d)(1)(A), (B), (C), (D).

The word "judgment" in subparagraph (A) of § 2244(d)(1) refers to the judgment of conviction and sentence, and "direct review" refers to direct appellate review of that judgment. *Redd v. McGrath,* 343 F.3d 1077, 1081 (9th Cir. 2003). Subparagraph (A) does not refer to an administrative decision, such as that of a Board of Prison Terms. *Id.* Insofar as the Petition alleges that petitioner's conviction in 1997 was unconstitutional, that conviction became final for purposes of the limitations period at the "conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court . . . ". *Wixom v. Washington,* 264 F.3d 894, 897-98 (9th Cir. 2001) (citation omitted), *cert. denied,* 534 U.S. 1143 (2002).

Under § 2244(d)(1)(A), the process of direct review does not conclude until either the United States Supreme Court has denied review, or, if no petition for certiorari has been filed, the ninety-day period for filing a petition for

certiorari has expired. *See Tillema v. Long,* 253 F.3d 494, 498 (9th Cir. 2001); *Bowen v. Roe,* 188 F.3d 1157, 1158-59 (9th Cir. 1999). Here, petitioner's conviction became final on December 28, 1999, which was the last day of the 90-day period after the California Supreme Court denied his petition for review during which a petition for certiorari could have been filed. *See Bowen,* 188 F.3d at 1159 (state court judgment becomes final after expiration of 90-day period for petitioning United States Supreme Court for certiorari). Therefore, petitioner had one year from December 28, 1999, in which to file his federal habeas corpus petition. Absent any statutory or equitable tolling, petitioner had until December 28, 2000, to file a habeas petition in federal court. *See* 28 U.S.C. § 2244(d). Petitioner filed the instant Petition on September 25, 2003, nearly three years after his conviction became final.

b. Statutory Tolling

The running of the AEDPA is "statutorily tolled" while a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). This provision tolls the statute for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Thus, in California, the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge. *See Nino v. Galaza,* 183 F.3d 1003, 1006 (9th Cir. 1999). For the periods of time *between* the filing of the state habeas petitions, statutory tolling is only available when those petitions comprise one complete round of the

state's appellate review process. *Tillema,* 253 F.3d at 502. A petitioner is not "entitled to tolling during the interval period between the completion of one round of state collateral review and the commencement of a second round of review." *King v. Roe,* 340 F.3d 821, 823 (9th Cir. 2003); *see also Biggs v. Duncan,* 339 F.3d 1045 (9th Cir. 2003). Additionally, the statute of limitations is not tolled between the time a final decision is issued on direct review and the time the first state collateral challenge is filed, because there is no case "pending" during that time. *See Nino,* 183 F.3d at 1006. Statutory tolling also does not apply during the pendency of a federal habeas petition. *See Duncan v. Walker,* 533 U.S. 167, 181, 182, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

Here, petitioner does not contend that he filed any habeas corpus petitions with the state that would toll all or part of the limitations period, nor does he provide any other facts that would demonstrate that he is eligible for statutory tolling.

c. Equitable Tolling

Petitioner has not offered any facts that would entitle him to equitable tolling of the statute of limitations period. The Ninth Circuit will permit equitable tolling of the AEDPA's limitations period "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Calderon v. United States Dist. Ct. (Kelly),* 163 F.3d 530, 541 (9th Cir. 1999)(petitioner's mental incompetence rendered him unable to assist counsel). When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be

appropriate. *Id.*; *Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir. 1999). In *Whalem/Hunt v. Early,* 233 F.3d 1146, 1148 (9th Cir. 2000), the court found that lack of AEDPA materials in the prison law library, coupled with the prisoner's ignorance of the AEDPA, could enable a prisoner to avoid the limitations bar. *See also Miles,* 187 F.3d at 1107 (prison officials' delay in issuing filing fee check and in sending the petition to the court justified tolling). According to the information petitioner has provided in his Petition and Reply, he does not qualify for equitable tolling of the statute of limitations.

d. 28 U.S.C. § 2244(d)(1)(B), (C) and (D).

Petitioner contends that his Petition is timely because it falls within the provisions of 28 U.S.C. § 2244(d)(1)(B), (C) and (D). (Reply at 3.) He contends that the United States Supreme Court's decision in *Stogner v. California,* ___U.S.___, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), removed a State created impediment, gave petitioner a retroactively applied constitutional right, and made it possible for petitioner to discover the factual predicate of his claim. (Reply at 4-5.) Petitioner further contends that because *Stogner* was not decided until June 26, 2003, petitioner had until June 26, 2004, to file a timely petition under the AEDPA. (Reply at 5.)

Petitioner's reliance on *Stogner* is misplaced. In *Stogner,* the United States Supreme Court held that California Penal Code section 803(g),[3] which effectively

[3] "Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age

(Continued on following page)

extended the statute of limitations for certain sexual offenses (including those of which petitioner was convicted), was unconstitutional because it violated the Ex Post Facto Clause of the Constitution. The Court specifically found that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is *applied to revive a previously time-barred prosecution.*" *Stogner,* 123 S.Ct. at 2461 (emphasis added).

California Penal Code section 803(g) was enacted as a "special supplementary statute of limitations for certain sex crimes against minors." *People v. Robertson,* 113 Cal.App.4th 389, 392, 6 Cal.Rptr.3d 363 (Cal.App. 5 Dist. 2003). The statute as originally enacted did not expressly state whether or not the statute was retroactive. However, in 1996, the statute was amended to expressly state that it was retroactive. The statute provided that "a pleading could be filed within one year of a qualifying report even where the defendant acquired a statute of limitations defense before 1994," when it was first enacted.[4] *Id.* at 392.

The Supreme Court in *Stogner* held that the 1996 version of section 803(g) violates the Constitution's Ex Post Facto Clause when it is applied to individuals who otherwise would have been safe from prosecution because California's six year statute of limitations had already run. (*See* Cal. Penal Code § 800, providing that " . . . prosecution for an offense punishable by imprisonment in the

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alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5." Cal. Penal Code § 803(g).

[4] California Penal Code section 803(g), as originally enacted, took effect on January 1, 1994. *Robertson,* 113 Cal.App.4th at 392.

state prison for eight years or more shall be commenced within six years after commission of the offense.") The *Stogner* Court reaffirmed the notion that "where a complete defense has arisen under a statute of limitations, it cannot be taken away by a subsequent repeal thereof." *Stogner,* 123 S.Ct. at 2453 (internal citations omitted).

The Court distinguished the application of the statute to individuals who had not yet acquired a defense under the statute of limitations as of the time of the enactment of the statute, from those whose crimes were already time-barred when section 803(g) was passed. *Id.* at 2453-54. The Court found that the statute was only unconstitutional when it was "applied to revive a previously time-barred prosecution." The Court opined that its decision did not affect previous law that found that extensions of unexpired statutes of limitations do not violate the Ex Post Facto Clause. *Id.*

Petitioner was charged with a violation of California Penal Code Section 288(b), forcible lewd act upon a child, that was alleged to have occurred "on or about December 23, 1989." (App. Pet. at 5.) Petitioner was also charged with a violation of California Penal Code Section 288.5, continuous sexual abuse, which was alleged to have occurred "on and between December 24, 1989 and June 30, 1991."[5] (App. Pet. At 5.) In both instances, California's six year statute of limitations would not have expired until December 1995. (Pet. at 6, 7.) Because California Penal Code Section 803(g) took effect on January 1, 1994, and

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[5] Petitioner does not contend that any of the other thirteen counts he was convicted of were outside the statute of limitations (Cal. Penal Code § 800). Therefore, the Court will not address the application of *Stogner* to those counts.

petitioner had not yet acquired a defense under the statute of limitations as of that date, his conviction is not affected by the Supreme Court's decision in *Stogner*.

Petitioner has no basis to rely on *Stogner* to justify his late filing of his habeas corpus petition, as that opinion neither removed a State created impediment, gave petitioner a retroactively applied constitutional right, nor made it possible for petitioner to discover the factual predicate of any of the claims in his Petition, *i.e.*, Grounds One through Five.[6] 28 U.S.C. § 2244(d)(1)(B), (C) and (D). Therefore, petitioner's Petition is untimely and barred under the AEDPA's one year statute of limitations.

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[6] As to Ground Three of the Petition (the admission of evidence under California Evidence Code §§ 1101(b) and 1108), *Stogner* does not aid petitioner in overcoming the one year statute of limitations. The Court's holding in *Stogner* specifically concerned the extension of the statute of limitations. It did not affect the admissibility of evidence at trial. *See Stogner*, 123 S.Ct. at 2461. Furthermore, in California "no specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible" under California Evidence Code section 1108. *People v. Pierce*, 104 Cal.App.4th 893, 900, 128 Cal.Rptr.2d 397 (Cal.App. 2 Dist. 2002)(holding that a 23-year old rape conviction was not too old to demonstrate defendant's propensity); *see also People v. Branch*, 91 Cal.App.4th 274, 284-85, 109 Cal.Rptr.2d 870 (Cal.App. 1 Dist. 2001). As the admissibility of evidence under California Evidence Code section 1108 is not determined by the statute of limitations, *Stogner* does not affect petitioner's claim in Ground Three of the Petition.

Grounds Four and Five of the Petition (*i.e.*, that it was error to not declare a mistrial, and ineffective assistance of counsel) are also not affected by *Stogner*. The factual and legal predicate for Ground Four existed at the time of petitioner's conviction, yet petitioner waited over three years to bring that claim to federal court. Ground Five, which alleged ineffective assistance of trial counsel for not raising the statute of limitations issue at trial, also does not remedy petitioner's untimely filing, as that claim relies on *Stogner*, and falls with petitioner's *Stogner* claim.

V
RECOMMENDATION

It is recommended that the District Court issue an Order: (1) adopting this Report and Recommendation; (2) granting respondent's Motion to Dismiss; and (3) entering Judgment denying and dismissing the Petition with prejudice.

DATED: March 4, 2004 /s/ Paul L. Abrams
PAUL L. ABRAMS
UNITED STATES
MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

Second Appellate District, Division Seven, No. B115212
S080532

IN THE SUPREME COURT OF CALIFORNIA

(Filed Sep. 29, 1999)

THE PEOPLE, Respondent

v.

WALTER DAVID T., Appellant

Appellant's petition for review DENIED.

Mock, J., is of the opinion the petition should be granted.

/s/ George
Chief Justice

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28 U.S.C. § 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

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28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or

law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

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28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> **(B)** the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon

the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by

the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

UNITED STATES CONSTITUTION

ARTICLE I, § 10, cl. 1

Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Amendments to the Constitution

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to the respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age (*see* Amdt. 26), and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

California Penal Code § 800. Offenses Punishable by imprisonment for eight years or more

Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense.

(Added by Stats.1984, c. 1270, § 2.)

California Penal Code § 803. Tolling or extension of time periods; revival of cause of action

(a) Except as provided in this section, a limitation of time prescribed in this chapter is not tolled or extended for any reason.

(b) No time during which prosecution of the same person for the same conduct is pending in a court of this state is a part of a limitation of time prescribed in this chapter.

(c) A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense described in this subdivision. This subdivision applies to an offense punishable by imprisonment in the state prison, a material element of which is fraud or breach of a fiduciary obligation, the commission of the crimes of theft or embezzlement upon an elder or dependent adult, or the basis of which is misconduct in office by a public officer, employee, or appointee, including, but not limited to, the following offenses:

(1) Grand theft of any type, forgery, falsification of public records, or acceptance of a bribe by a public official or a public employee.

(2) A violation of Section 72, 118, 118a, 132, or 134.

(3) A violation of Section 25540, of any type, or Section 25541 of the Corporations Code.

(4) A violation of Section 1090 or 27443 of the Government Code.

(5) Felony welfare fraud or Medi-Cal fraud in violation of Section 11483 or 14107 of the Welfare and Institutions Code.

(6) Felony insurance fraud in violation of Section 548 or 550 of this code or former Section 1871.1, or Section 1871.4, of the Insurance Code.

(7) A violation of Section 580, 581, 582, 583, or 584 of the Business and Professions Code.

(8) A violation of Section 22430 of the Business and Professions Code.

(9) A violation of Section 10690 of the Health and Safety Code.

(10) A violation of Section 529a.

(11) A violation of subdivision (d) or (e) of Section 368.

(d) If the defendant is out of the state when or after the offense is committed, the prosecution may be commenced as provided in Section 804 within the limitations of time prescribed by this chapter, and no time up to a maximum of three years during which the defendant is not within the state shall be a part of those limitations.

(e) A limitation of time prescribed in this chapter does not commence to run until the offense has been discovered, or could have reasonably been discovered, with

regard to offenses under Division 7 (commencing with Section 13000) of the Water Code, under Chapter 6.5 (commencing with Section 25100) of, Chapter 6.7 (commencing with Section 25280) of, or Chapter 6.8 (commencing with Section 25300) of, Division 20 of, or Part 4 (commencing with Section 41500) of Division 26 of, the Health and Safety Code, or under Section 386, or offenses under Chapter 5 (commencing with Section 2000) of Division 2 of, Chapter 9 (commencing with Section 4000) of Division 2 of, Section 6126 of, Chapter 10 (commencing with Section 7301) of Division 3 of, or Chapter 19.5 (commencing with Section 22440) of Division 8 of, the Business and Professions Code.

(f)(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a responsible adult or agency by a child under 18 years of age that the child is a victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.

(2) For purposes of this subdivision, a "responsible adult" or "agency" means a person or agency required to report pursuant to Section 11166. This subdivision applies only if both of the following occur:

(A) The limitation period specified in Section 800 or 801 has expired.

(B) The defendant has committed at least one violation of Section 261, 286, 288, 288a, 288.5, 289, or 289.5 against the same victim within the limitation period specified for that crime in either Section 800 or 801.

(3)(A) This subdivision applies to a cause of action arising before, on, or after January 1, 1990, the effective

date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs:

(i) The complaint or indictment was filed on or before January 1, 1997, and it was filed within the time period specified in this subdivision.

(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision.

(iii) The victim made the report required by this subdivision to a responsible adult or agency after January 1, 1990, and a complaint or indictment was not filed within the time period specified in this subdivision, but a complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding whether retroactive application of this section is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

(iv) The victim made the report required by this subdivision to a responsible adult or agency after January 1, 1990, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, but a new complaint or indictment is or was filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding whether retroactive application of this section is constitutional, becomes final or the United States Supreme Court files an opinion deciding the

question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

(B)(i) If the victim made the report required by this subdivision to a responsible adult or agency after January 1, 1990, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, a new complaint or indictment may be filed notwithstanding any other provision of law, including, but not limited to, subdivision (c) of Section 871.5 and subdivision (b) of Section 1238.

(ii) An order dismissing an action filed under this subdivision, which is entered or becomes effective at any time prior to 180 days after the date on which either a published opinion of the California Supreme Court, deciding the questions of whether retroactive application of this section is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first, shall not be considered an order terminating an action within the meaning of Section 1387.

(iii) Any ruling regarding the retroactivity of this subdivision or its constitutionality made in the course of the previous proceeding, including any review proceeding, shall not be binding upon refiling.

(g)(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the

victim of a crime described in Section 261, 286, 288, 288a 288.5, 289, or 289.5.

(2) This subdivision applies only if both of the following occur:

(A) The limitation period specified in Section 800 or 801 has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

(3)(A) This subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs:

(i) The complaint or indictment was filed on or before January 1, 1997, and it was filed within the time period specified in this subdivision.

(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision.

(iii) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was not filed within the time period specified in this subdivision, but a complaint or indictment is filed no later than 180 days after

the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional whichever occurs first.

(iv) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, but a new complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

(B)(i) If the victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, a new complaint or indictment may be filed notwithstanding any other provision of law, including, but not limited to, subdivision (c) of Section 871.5 and subdivision (b) of Section 1238.

(ii) An order dismissing an action filed under this subdivision, which is entered or becomes effective at any time prior to 180 days after the date on which either a

published opinion of the California Supreme Court, deciding the question of whether retroactive application of this section is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first, shall not be considered an order terminating an action within the meaning of Section 1387.

(iii) Any ruling regarding the retroactivity of this subdivision or its constitutionality made in the course of the previous proceeding, by any trial court or any intermediate appellate court, shall not be binding upon refiling.

(h)(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person under 21 years of age, alleging that he or she, while under 18 years of age, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.

(2) This subdivision applies only if both of the following occur:

(A) The limitation period specified in Section 800 or 801 has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

(3) This subdivision applies to a cause of action arising before, on, or after January 1, 2002, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if the complaint or indictment was filed within the time period specified by this subdivision.

(i)(1) Notwithstanding the limitation of time described in Section 800, the limitations period for commencing prosecution for a felony offense described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 290, where the limitations period set forth in Section 800 has not expired as of January 1, 2001, or the offense is committed on or after January 1, 2001, shall be 10 years from the commission of the offense, or one year from the date on which the identity of the suspect is conclusively established by DNA testing, whichever is later, provided, however, that the one-year period from the establishment of the identity of the suspect shall only apply when either of the following conditions is met:

(A) For an offense committed prior to January 1, 2001, biological evidence collected in connection with the offense is analyzed for DNA type no later than January 1, 2004.

(B) For an offense committed on or after January 1, 2001, biological evidence collected in connection with the offense is analyzed for DNA type no later than two years from the date of the offense.

(2) In the event the conditions set forth in subparagraph (A) or (B) of paragraph (1) are not met, the limitations period for commencing prosecution for a felony offense described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 290, where the limitations period

set forth in Section 800 has not expired as of January 1, 2001, or the offense is committed on or after January 1, 2001, shall be 10 years from the commission of the offense.

(3) For purposes of this section, "DNA" means deoxyribonucleic acid.

(j) For any crime, the proof of which depends substantially upon evidence that was seized under a warrant, but which is unavailable to the prosecuting authority under the procedures described in People v. Superior Court (Laff) (2001) 25 Cal.4th 703, People v. Superior Court (Bauman & Rose) (1995) 37 Cal.App.4th 1757, or subdivision (c) of Section 1524, relating to claims of evidentiary privilege or attorney work product, the limitation of time prescribed in this chapter shall be tolled from the time of the seizure until final disclosure of the evidence to the prosecuting authority. Nothing in this section otherwise affects the definition or applicability of any evidentiary privilege or attorney work product.

(k)(1) In a criminal investigation involving child sexual abuse as described in subdivision (g) or (h), when the limitations period set forth therein has not expired, that period shall be tolled from the time a party initiates litigation challenging a grand jury subpoena until the end of that litigation, including any associated writ or appellate proceeding, or until the final disclosure of evidence to the investigating or prosecuting agency, if that disclosure is ordered pursuant to the subpoena after the litigation.

(2) Nothing in this subdivision affects the definition or applicability of any evidentiary privilege.

(3) This subdivision shall not apply where a court finds that the grand jury subpoena was issued or caused to be issued in bad faith.

(l) As used in subdivisions (f), (g), and (h), Section 289.5 refers to the statute enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object.[1]

California Evidence Code § 1101. Evidence of character to prove conduct

(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

---

[1] Former Penal Code § 289.5, repealed by Stats. 1993-94, 1st Ex. Sess., c. 39, § 2. See Penal Code § 289.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

California Evidence Code § 1108. Evidence of another sexual offense by defendant; disclosure; construction of section

(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.

(c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.

(d) As used in this section, the following definitions shall apply:

(1) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:

(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or

Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code.

(B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem.

(C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

(D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

(E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

(F) An attempt or conspiracy to engage in conduct described in this paragraph.

(2) "Consent" shall have the same meaning as provided in Section 261.6 of the Penal Code, except that it does not include consent which is legally ineffective because of the age, mental disorder, or developmental or physical disability of the victim.

Superior Court of the State of California
for the County of Los Angeles

No. SA024015

The People of the State of California,

Plaintiff,

v.

Walter David Tallmadge,

Defendant.

COUNT 1

On or about December 23, 1989, in the County of Los Angeles, the crime of FORCIBLE LEWD ACT UPON CHILD, in violation of PENAL CODE SECTION 288(B), a Felony, was committed by WALTER DAVID TALLMADGE, who did willfully, unlawfully, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of MICHELLE Z., a child under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant(s) and the said child, by force, violence, duress, menace, and threat of great bodily harm.

"NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c)(6)."

It is further alleged that at the time of the commission of the above offense said defendant(s), WALTER DAVID TALLMADGE, occupied a position of special trust, to wit, CARETAKER, and committed an act of substantial sexual conduct, to wit, PENETRATION OF THE VAGINA OF

THE VICTIM BY THE PENIS OF SAID DEFENDANT(S), within the meaning of Penal Code section 1203.066(a)(9).

* * *

COUNT 2

On and between December 24, 1989 and June 30, 1991, in the County of Los Angeles, the crime of CONTINUOS [sic] SEXUAL ABUSE, in violation of PENAL CODE SECTION 288.5, a Felony, was committed by WALTER DAVID TALLMADGE, who did willfully and unlawfully engage in three and more acts of "substantial sexual conduct", as defined in Penal Code section 1203.066(b), and three and more acts in violation of Section 288 with MICHELLE Z., a child under the age of 14 years, while the defendant(s) resided with, and had recurring access to, the child.

"NOTICE: Conviction of this offense will require you to register pursuant to Penal Code section 290. Willful failure to register is a crime."

* * *

ABSTRACT OF JUDGMENT – PRISON COMMITMENT 000615 FORM DSL

☒ SUPERIOR ☐ MUNICIPAL ☐ JUSTICE } COURT OF CALIFORNIA, COUNTY OF Los Angeles

COURT (I.D.) 1 9 0 0 1 1 | BRANCH OR JUDICIAL DISTRICT: West | BKG# 4644154

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: 01 Tallmadge, Walter David
AKA:

☒ PRESENT ☐ NOT PRESENT

SA024015 - A
- B
- C
- D
- E

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT

AMENDED ABSTRACT ☐

DATE OF HEARING (MO) (DAY) (YR)	DEPT. NO	JUDGE	CLERK
07-08-97	WEN	Robert Altman	E Goldstein

REPORTER	COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	PROBATION NO. OR PROBATION OFFICER
G Chavez	P Beckstrand	L Levine, Pvt	343317

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES (OR ALTERNATE FELONY/MISDEMEANORS):

☒ ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT 1 (NUMBER OF PAGES)

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTED BY JURY TRIAL	COURT TRIAL	PLEA	SENTENCE RELATION TERM (L,M,U)	CONCURRENT	CONSECUTIVE 1/3 VIOLENT	CONSECUTIVE 1/3 NON-VIO	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE(S) CONSECUTIVE	654 STAY	PRINCIPAL CONSECUTIVE TIME IMPOSED YEARS	MO
2	PC	288.5	Cont sex abuse	89	06	17	97	x			U							32	
1	PC	288(b)	Lewd act und 14 fo	89	06	17	97	x			U				x			16	
3	PC	288(b)	Lewd act und 14 fo	91	06	17	97	x			U				x			16	
4	PC	288(b)	Lewd act und 14 fo	91	06	17	97	x			U				x			16	
5	PC	288(b)	Lewd act und 14 fo	91	06	17	97	x			U				x			16	

2. ENHANCEMENTS charged and found true TIED TO SPECIFIC COUNTS (mainly in the § 12022-series) including WEAPONS, INJURY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC.:
For each count list enhancements horizontally. Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385.
Add up time for enhancements on each line and enter line total in right-hand column.

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

3. ENHANCEMENTS charged and found true FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS (mainly § 667-series) and OTHER.
List all enhancements based on prior convictions or prior prison terms charged and found true. If 2 or more under the same section, repeat it for each enhancement (e.g., if 2 non-violent prior prison terms under § 667.5(b) list § 667.5
times). Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add time for these enhancements and enter total in right-hand column. Also enter her
other enhancement not provided for in space 2.

Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

4. INCOMPLETED SENTENCE(S) CONSECUTIVE:

COUNTY	CASE NUMBER	CREDIT FOR TIME SERVED

5. OTHER ORDERS: Pay $10,000.00 Restitution fine.
Sentenced purs to PC 667(e)(1).
Court recommends housing at: Pelican
Court recommends Defendants contact w
outside world be monitored.

6. TOTAL TIME IMPOSED ON ALL ATTACHMENT PAGES (FORM DSL 290-A): 185
7. TIME STAYED TO COMPLY WITH 5-YEAR OR 10-YEAR LIMIT ON SUBORDINATE TERMS, DOUBLE-BASED-TERM LIMIT, ETC. (Do not include § 654 stays or discretionary stays of term for enhancements.): 16
8. TOTAL TERM IMPOSED: 265
9. EXECUTION OF SENTENCE IMPOSED:

A. ☒ AT INITIAL SENTENCING HEARING B. ☐ AT RESENTENCING PURSUANT TO DECISION ON APPEAL C. ☐ AFTER REVOCATION OF PROBATION D. ☐ AT RESENTENCING PURSUANT TO RECALL OF COMMITMENT (PC § 1170(d)) E. ☐ OTHER

10. DATE OF SENTENCE PRONOUNCED (MO) (DAY) (YR) 07-08-97 | CREDIT FOR TIME SPENT IN CUSTODY: TOTAL DAYS 865 INCLUDING: ACTUAL LOCAL TIME 577 LOCAL CONDUCT CREDITS 288 | STATE INSTITUTIONS ☐ DMH ☐ CDC

11. DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:

☒ FORTHWITH ☐ AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS

INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:

☐ CALIF. INSTITUTION FOR WOMEN – FRONTERA ☐ CALIF. MEDICAL FACILITY – VACAVILLE ☒ CALIF. INSTITUTION FOR MEN – CHINO ☐ DEUEL VOC. INST ☐ SAN QUENTIN ☐ OTHER (SPECIFY):

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE [signature] DATE 08-11-97

BEST AVAILABLE COPY

ABSTRACT OF JUDGMENT – PRISON COMMITMENT
ATTACHMENT PAGE

000616 FORM DSL 290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles
COURT I.D. 1 9 0 0 1 1 BRANCH West
BKG# 4644154

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: 01 Tallmadge, Walter David
AKA:

☒ PRESENT ☐ NOT PRESENT

CASE NUMBER (S): SA024015 - A; - B; - C; - D; - E

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT
AMENDED ABSTRACT ☐

DATE OF HEARING (MO) (DAY) (YR): 0708 97

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES (OR ALTERNATE FELONY/MISDEMEANORS):

THIS IS ATTACHMENT PAGE NO. 1

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTED BY JURY TRIAL	COURT TRIAL	P.J.A.	SENTENCE RELATION TERM (L,M,U)	CONCURRENT	CONSECUTIVE (1/3 VIOLENT)	CONSECUTIVE (1/3 NON-VIC)	CONSECUTIVE FULL TERM	SUBSEQUENT SENTENCE(S) (15-YEAR-LIFE)	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED YEARS	MON
6	PC	261(a)(2)	Rape force fear	91	06	17	97	x			U				x			16	
7	PC	288(b)	Oral cop und 14 f	91	06	17	97	x			U				x			16	
8	PC	289(a)	Pene genital/ana	91	06	17	97	x			U				x			16	
9	PC	288(b)	Oral cop und 14 f	91	06	17	97	x			U				x			16	
10	PC	288.5	Cont sex abuse	91	06	17	97	x			U				x			16	
11	PC	288(b)	Lewd act und 14 f	93	06	17	97	x			U				x			16	
13	PC	288(b)	Lewd act und 14 f	93	06	17	97	x			U				x			16	
14	PC	288(b)	Lewd act und 14 f	93	06	17	97	x			U				x			16	
15	PC	288(b)	Lewd act und 14 f	94	06	17	97	x			U				x			16	
16	PC	288(b)	Lewd act und 14 f	94	06	17	97	x			U				x			16	
																		TOTAL 160	

2. ENHANCEMENTS charged and found true, TIED TO SPECIFIC COUNTS (mainly in the 12022 series) for counts listed on this page.

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
12	12022.3a	10									10
13	12022	10									10
										TOTAL	20

3. ENHANCEMENTS charged and found true FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS (mainly § 667-series) and OTHER.

Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
667(a)(1)	5									5
Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

4. TOTAL TIME IMPOSED ON THIS ATTACHMENT PAGE: 185

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Attorneys for Petitioner Walter David Tallmadge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WALTER DAVID TALLMADGE,

Petitioner

vs.

MIKE KNOWLES, Warden,

Respondents.

Case No.
CV-03-7701-PA (PLA)

Hon. Percy Anderson
United States
District Judge

REQUEST FOR CERTIFICATE OF APPEALABILITY PURSUANT TO RULE 22 FED.R.APP.P. AND 28 U.S.C. § 2253(C)

(Filed Apr. 14, 2004)

Petitioner, Walter David Tallmadge, by his attorneys, Albert E. Wehde and Robert E. Sutton, respectfully

requests that the District Court issue a Certificate of Appealability in this matter, granting leave to appeal the Order of the Court, filed March 29, 2004, and the Judgment entered in this matter on March 30, 2004, in which the Court adopted the final report and recommendation of the magistrate judge and denied and dismissed the petition.

Petitioner Tallmadge respectfully requests that a certificate of appealability issue in order that he may appeal the denial of his Petition for a Writ of Habeas Corpus, in which petitioner made a substantial showing of his constitutional rights.

The specific issues that petitioner seeks review of in the Court of Appeals and that satisfy the showing required by 28 U.S.C. § 2253(c)(2) (substantial showing of the denial of a constitutional right) are as follows:

1. Whether the prosecution of the petitioner for violation of §§ 288(b) and 288.5, Cal. Penal Code, after expiration of the six-year limitations period authorized by § 800, Cal. Penal Code, violated petitioner's rights under the United States Constitution's **Ex Post Facto Clause**, Art. 1, § 10, cl. 1, giving petitioner a viable cause of action pursuant to the United States Supreme Court's decision in *Stogner v. California*, 539 U.S. ___, 156 L.Ed.2d 544, 123 S.Ct. 2446 (2003), and was the United States Magistrate Judge's determination that the Supreme Court's decision in *Stogner* was not applicable to petitioner's conviction clearly erroneous?

2. Did the prosecution of petitioner for violations of various California sex crime statutes and the introduction of evidence of crimes for which the statute of limitations had long expired, in order to convict petitioner, authorized

by the provisions of § 803(g), Cal. Penal Code, and §§ 1101(b) and 1108(b), Cal. Evidence Code, violate the Constitution's **Ex Post Facto Clause**, Art. 1, § 10, cl. 1, and fall within the fourth category of **ex post facto** law ("every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender") as set forth by the United States Supreme Court in *Stogner v. California*, 539 U.S. ___, 156 L.Ed.2d 544, 123 S.Ct. 2446 (2003)?

3. Was the application of §§ 1101(b) and 1108(b), Cal. Evidence Code, to convict petitioner, unconstitutional under the **Ex Post Facto Clause**, Art. 1, § 10, cl. 1, of the United States Constitution because they permitted evidence of acts for which the statute of limitations authorized by § 800, Cal. Penal Code, had expired to be introduced into evidence, in order to convict petitioner, where such alleged acts occurred prior to enactment of § 803(g), Cal. Penal Code, which extended the limitations period for prosecution of sex crimes against minors, and after the limitations period authorized by § 800, Cal. Penal Code, had expired, and where the United States Supreme Court's decision in *Stogner v. California* rendered unconstitutional Cal. Penal Code § 803(g)'s retroactivity provision that permitted otherwise time-barred criminal prosecutions?

4. Did the Supreme Court's decision in *Stogner v. California*, announce a new rule of constitutional law applicable to petitioner that was not previously available to him, thereby allowing the "safety valve" provisions contained in 28 U.S.C. §2254 (as amended by AEDPA § 104(4) and 28 U.S.C. § 2244(d)(1)(C) (as amended by AEDPA § 101)) limitations period for bringing a habeas

corpus petition attacking a state court conviction in Federal court prescribed by 28 U.S.C. § 2244(d)(1)(A)?

The substantive issues presented by petitioner demonstrate that each of those issues is debatable among jurists of reason and deserve encouragement to proceed further. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

For all of the foregoing reasons, petitioner respectfully requests that this Court issue a Certificate of Appealability in this matter. Petitioner submits, herewith, his Notice of Appeal.

Respectfully submitted,

/s/ Robert E. Sutton
Robert E. Sutton
Wisconsin SBN 1008459
Attorney for Petitioner

2631 N. Downer Avenue
Milwaukee, WI 53211
(414) 961-0802

194, APPEAL

U.S. District Court
CENTRAL DISTRICT OF CALIFORNIA
(Western Division – Los Angeles)
CIVIL DOCKET FOR CASE #: 2:03cv07701

Walter D. Tallmadge v.
Mike Knowles, et al
Assigned to: Judge Percy Anderson
Referred to:
Magistrate Judge Paul L. Abrams
Demand: $0
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 10/28/2003
Jury Demand: None
Nature of Suit:
530 Habeas Corpus (General)
Jurisdiction:
Federal Question

Petitioner

Walter David Tallmadge

represented by **Albert Edward Wehde**
AEW Consulting
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ATTORNEY TO BE NOTICED

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V.

Respondent

Mike Knowles, *Warden*

represented by **Noah P Hill**
CAAG – Office of Attorney General of California
300 S Spring St, Ste 5000
Los Angeles, CA 90013-1230
213-897-2000
Fax: 213-897-6496
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Attorney General of the State of California

Date Filed	#	Docket Text
09/25/2003	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Walter David Tallmadge in State Custody referred; fee status IFP pending (rrey) (Entered: 10/31/2003)
10/03/2003	2	ORDER by Dale A Drozd Magistrate Judge ORDERING Case TRANSFERRED to District of USDC-Central District of California; $5.00 filing fee paid (rrey) Modified on 10/31/2003 (Entered: 10/31/2003)
10/28/2003		ORIGINAL file, certified copy of transfer order and docket sheet received from USDC Eastern District of

		California (Sacramento), Case No. 03-cv-2010 (rrey) (Entered: 10/31/2003)
10/28/2003		CASE REFERRED to Magistrate Judge Paul L. Abrams (rrey) (Entered: 10/31/2003)
10/28/2003	3	NOTICE OF REFERENCE to Magistrate Judge Paul L. Abrams (rrey) (Entered: 10/31/2003)
10/28/2003	5	APPLICATION filed by petitioner for attorney Robert E Sutton to appear pro hac vice (dmjr) (Entered: 11/12/2003)
11/10/2003	4	ORDER by Magistrate Judge Paul L. Abrams requiring response to petition for writ of habeas corpus (see document for details) (dmjr) (Entered: 11/10/2003)
11/10/2003	6	MINUTES: [in chambers] denying without prejudice application for attorney Robert E Sutton to appear pro hac vice [5-1]. No local counsel listed by Magistrate Judge Paul L. Abrams CR: none (dmjr) (Entered: 11/12/2003)
11/13/2003	7	RETURN RECEIPT of Certified Mail showing delivery to CA Attorney General of petition on 11/12/03 (dmjr) (Entered: 11/14/2003)
11/21/2003	8	NOTICE OF INTERESTED PARTIES filed by respondent Mike Knowles (dmjr) (Entered: 11/24/2003)
11/21/2003	9	NOTICE by respondent of appearance of counsel (dmjr) (Entered: 11/24/2003)
12/10/2003	10	APPLICATION filed by respondent to extend time to answer habeas corpus petition [1-1] to 1/9/04 as to respondent

		Mike Knowles Lodged order (dmjr) (Entered: 12/11/2003)
12/11/2003	*11*	ORDER by Magistrate Judge Paul L. Abrams granting application to extend time to answer habeas corpus petition [1-1] to 1/9/04 as to respondent Mike Knowles [10-1]; Petitioner shall have to and including February 9, 2004 to reply to the motion to dismiss or a traverse to the answer and return. (shb) (Entered: 12/12/2003)
01/08/2004	•12	MOTION to Dismiss petition for writ of habeas corpus filed by respondent Mike Knowles, Warden of Mule Creek State Prison at Ione, CA; memorandum of points and authorities in support thereof; exhibits. (gk,) (Entered: 01/11/2004)
02/09/2004	•13	REPLY to response to MOTION to Dismiss petition for writ of habeas corpus[12] filed by petitioner Walter David Tallmadge. (dmjr,) (Entered: 02/12/2004)
02/17/2004	•14	NOTICE of verification of plaintiff filed by petitioner Walter David Tallmadge. (dmjr,) (Entered: 02/19/2004)
02/19/2004	•15	NOTICE OF MOTION AND MOTION for Bail for medical treatment Pending Resolution of Habeas Corpus Petition filed by petitioner Walter David Tallmadge. (dmjr,) (Entered: 02/20/2004)
02/20/2004	•*16*	MINUTES [In Chambers] by Magistrate Judge Paul L. Abrams. Failure to designate local counsel in accordance with Local Rule 83-2.3 by 3/12/04, may

result in attorney Sutton being precluded from further appearancing in this matter. (ch,) (Entered: 02/23/2004)

02/20/2004 •17 MINUTES [In Chambers] by Magistrate Judge Paul L. Abrams. Petitioner's Motion for Bail Pending Resolution of Habeas Corpus Petition[15] is DENIED without prejudice. Motions terminated: [15] MOTION for Bail Pending Resolution of Habeas Corpus Petition (ch,) (Entered: 02/23/2004)

03/03/2004 •18 NOTICE OF Local Counsel (Leonard R. Dubin) re application for pro hac vice by Robert E. Sutton filed by Petitioner Walter David Tallmadge. (pbap,) (Entered: 03/04/2004)

03/04/2004 •19 CORRECTED NOTICE of Local Counsel. Attorney Robert E. Sutton has applied for a pro hac vice admission to this Court, advises that local counsel will be Anthony E. Bell, 700 S. Flower Street, Suite 1100, Los Angels [sic], California 90017, 213-892-6340; fax 213-892-2240 filed by Petitioner Walter David Tallmadge. (pbap,) (Entered: 03/08/2004)

03/08/2004 •20 MINUTES [In Chambers] by Magistrate Judge Paul L. Abrams. Robert E. Sutton's Pro Hac Vice Application is hereby GRANTED. (ch,) (Entered: 03/08/2004)

03/08/2004 •21 NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Paul L. Abrams. Objections to R&R due by 3/22/2004.(ch,) (Entered: 03/08/2004)

03/08/2004	•22	REPORT AND RECOMMENDATION by Magistrate Judge Paul L. Abrams. (ch,) (Entered: 03/08/2004)
03/22/2004	•26	OBJECTION to Report and Recommendation (Final)[22] filed by Petitioner Walter David Tallmadge.(pj,) (Entered: 04/05/2004)
03/29/2004	•*23*	FINAL REPORT AND RECOMMENDATION by Magistrate Judge Paul L. Abrams filed.(pbap,) (Entered: 03/30/2004)
03/29/2004	•*24*	ORDER by Judge Percy Anderson ADOPTING MAGISTRATE JUDGE'S Report and Recommendation (Final)*23* (pbap,) (Entered: 03/30/2004)
03/29/2004	•*25*	JUDGMENT, ADJUDGED by Judge Percy Anderson that the Petition for Writ of Habeas Corpus[1] in this matter is denied and dismissed with prejudice, (Made JS-6. Case Terminated.) (pbap,) (Entered: 03/30/2004)
04/14/2004	•27	NOTICE OF APPEALS to 9th CCA filed by petitioner Walter David Tallmadge. Appeal of Order *24* Filed On: 3/29/04; Entered On: 3/30/04, Judgment *25* Filed On: 3/29/04; Entered On: 3/30/04; Certificate of Appealability Pending; Filing fee $ 255., Paid receipt number 13895 cc: Robert E. Sutton; Albert E. Wehde; State Attorney General. (ghap,) (Entered: 04/14/2004)
04/14/2004	•28	PETITION for Certificate of Appealability to USDC by petitioner Walter David Tallmadge. (ghap,) (Entered: 04/14/2004)

04/19/2004	•29	Order by Judge Paul L. Abrams denying certificate of appealability. [28] (fvap,) (Entered: 04/19/2004)
04/26/2004	•30	CERTIFICATE OF RECORD Transmitted to USCA re Appeal to Circuit Court, [27] filed by Walter David Tallmadge. (wdc,) (Entered: 04/26/2004)
04/26/2004	•31	RECORD ON APPEAL sent to Circuit Court re: Record consists of 1 thru 3 volumes. (wdc,) (Entered: 04/26/2004)
04/26/2004	•	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: Appeal to Circuit Court, [27]. (wdc,) (Entered: 04/26/2004)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WALTER DAVID TALLMADGE,

Petitioner,

vs.

MIKE KNOWLED [sic], Warden,

Respondent.

Case No.
CV-03-7701-PA (PLA)

Hon. Paul L. Abrams
U.S. Magistrate Judge

PETITIONER'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner, Walter David Tallmadge, by his attorneys, Anthony E. Bell and Robert E. Sutton, submits the following objections to the Report and Recommendation of United States Magistrate Judge, Hon. Paul L. Abrams, filed in the above-captioned matter on March 8, 2004, and in which the Magistrate Judge recommends that the court deny the Petition for Writ of Habeas Corpus with prejudice.

FIRST OBJECTION

Petitioner Tallmadge objects to the Magistrate Judge's conclusion that Tallmadge had not acquired a defense under the statute of limitations and that the charged violations of California Penal Code Section 288(b), forcible lewd act upon a child, that was alleged to have occurred "on or about December 23, 1989," (App. Pet. at 5) and § 288.5, continuous sexual abuse, which was alleged to have occurred "on and between December 24, 1989 and June 30, 1991," were within the statute's time limitations.

In the instant case, the six-year statute of limitations applicable to violation of § 288(b), Cal. Penal Code, and § 288.5 (Penal Code, § 800),as extended by § 803(g), had expired as to these two counts before the prosecution commenced. The Magistrate Judge found that "California's six year statute of limitations would not have expired until December 1995," in both instances. However, the Information charging Tallmadge was filed on March 27, 1996. This means that the Information charging Tallmadge with violations of §§ 288(b) and 288.5 was filed, and prosecution begun, **after** the expiration of the six-year statute of limitations expired in December, 1995; as petitioner contends in his Petition. The statute of limitations in a criminal case is jurisdictional. **People v. Lopez**, 60 Cal.Rptr.2d 511, 52 Cal.App.4th 233 (App. 3 Dist. 1997).

The State of California contended in its Motion to Dismiss Petition for Writ of Habeas Corpus and Memorandum in Support thereof that, "[p]etitioner was not charged, nor was the jury instructed, pursuant to the statute at issue in **Stogner**, California Penal Code section 803(g)." (Respondent's Memorandum, p.5).

However, Tallmadge could **not** have been prosecuted for offenses that occurred in December, 1989 under the six-year limitations period prescribed under § 800, Cal. Penal Code because the Information was filed and prosecution begun on March 27, 1996; several months **after** the December, 1995 expiration of the six-year limitations period allowed for prosecution under § 800 of the Penal Code. Tallmadge's prosecution was clearly outside the six-year limitations period under § 800, Cal. Penal Code.

Moreover, § 803(g)'s effective date was January 1, 1997. (Stats. 1993, ch. 390, § 1, eff. Jan. 1, 1994, amended Stats. 1996, ch. 130, § 1, eff. Jan. 1, 1997, and Stats. 1997, ch. 29, § 1, eff. June 30, 1997. The six-year statutory limitations period prescribed by § 800, Cal. Penal Code, expired a full two years before § 803(g), Cal. Penal Code, became effective.

Therefore, any prosecution of Tallmadge after the expiration of the six-year limitations period authorized under § 800, Cal. Penal Code, violated the Constitution's **Ex Post Facto** Clause, Art. 1, § 10, cl. 1, and **Stogner** applies to Tallmadge's conviction. In view of this, the Magistrate Judge's analysis and conclusion that **Stogner** was not applicable to Tallmadge's conviction is clearly erroneous. Tallmadge's conviction violates the Constitution's **Ex Post Facto Clause**, Art. 1, § 10, cl. 1, and is circumscribed by the Supreme Court's decision in **Stogner**.

SECOND OBJECTION

Petitioner Tallmadge objects to the Magistrate Judge's conclusions that (1) Tallmadge's conviction is not affected by the Supreme Court's decision in **Stogner [v. California,**

539 U.S. ___, 156 L.Ed.2d 544, 123 S.Ct. 2446 (2003)], and (2) that the United States Supreme Court found that § 803(g), Cal. Penal Code, "was only unconstitutional when it was 'applied to revive a previously time-barred prosecution.'" (Magistrate's Report and Recommendation, p.8) (Hereinafter, "MRR" followed by page number)

The Supreme Court clearly stated in **Stogner** that:

> "In finding that California's law falls within the literal terms of Justice Chase's second category, we do not deny that it may fall within another category as well. Justice Chase's fourth category, for example, includes any 'law that alters the **legal** rules of evidence and receives less, or different testimony, than the law required at the time of the offence, **in order to convict the offender.'**" **Stogner**, 156 L.Ed. at 554 (citing **Calder v. Bull**, 3 Dall. 386 at 390).

It is clear that the United States Magistrate Judge completely failed to analyze the constitutionality of Cal. Penal Code § 803(g)'s retroactivity provision, which permitted evidence relating to sexual acts with **Michelle Z.**, that allegedly occurred in **1987**, more than six years before the enactment of § 803(g) (January 1, 1994) and that was clearly outside the six-year limitations period under § 800 Penal Code. The Magistrate Judge did not analyze, as to Tallmadge, the constitutionality of Cal. Penal Code § 803(g), under Justice Chase's fourth category of **ex post facto laws**, set forth by the Supreme Court in **Stogner**, 156 L.Ed.2d at 554.

The United States Magistrate Judge did not apply the Supreme Court's analysis of Justice Chase's fourth category of **ex post facto laws** to Tallmadge's challenge to the constitutionality of §§ 1101(b) and 1108(b) of the California

Evidence Code, as those provisions were applied to Tallmadge via § 803(g)'s retroactivity provision.

The retroactivity provision of § 803(g), Cal. Penal Code, permitted evidence to be admitted at Tallmadge's trial under §§ 1101(b) and 1108(b) of sexual acts allegedly occurring between Tallmadge and **Deborah B.** in 1966 that were never charged and also during the time when the statute of limitations for bringing charges for commission of those acts was three years. However, the alleged acts testified to at Tallmadge's trial occurred twenty-seven (27) years prior to the trial and the incidents described were based solely on the witness's memory. As the Court stated in **Stogner:**

> "Memories fade, and witnesses can die or disappear. . . . Such problems can plague child abuse cases, where recollection after so many years may be uncertain, and 'recovered' memories faulty, but may nonetheless lead to prosecutions that destroy families. . . . Regardless, a constitutional principle must apply not only in child abuse cases, but in every criminal case." **Stogner**, 156 L.Ed.2d at 564-565.

Introduction of evidence of alleged sexual acts with **Deborah B.**, and alleged sexual acts with **Michelle Z.**, in 1987, under § 803(g), Cal. Penal Code, constitute "subtle" **ex post facto** violations that are "no more permissible than overt ones." **Stogner, supra**, 156 L.Ed.2d at 555 (citing **Collins v. Youngblood**, 497 U.S. 37, 46 (1990)).

The six-year statute of limitations under § 800 and its extension under § 803(g) had also long expired for the sex acts allegedly occurring between petitioner and **Marylee M.** (allegedly occurring in 1985); **Susana J.**, (allegedly occurring in 1984); and **Danielle T.**, (allegedly occurring

in 1982), that were introduced into evidence at Tallmadge's trial. The complaint alleging sexual acts with **Danielle T.**, was filed with the authorities 12 years **after** the statute of limitations established under § 800 Cal. Penal Code had expired and years after the enactment of § 803(g) in January, 1994.

The application of §§ 1101(b) and 1108(b), Cal. Evidence Code, via § 803(g), Cal. Penal Code, was unconstitutional as applied to Tallmadge's case and violated the Constitution's **Ex Post Facto Clause**, Art. 1, § 10, cl. 1, and the Fourteenth Amendment's Due Process and Equal Protection clauses. The application of §§ 803(g), 1101(b) and 1108(b), allowing evidence of acts for which the limitations periods under §§ 800 and 803(g), Cal. Penal Code, had expired, **in order to convict** Tallmadge, clearly falls squarely within Justice Chase's fourth category of **ex post facto** laws, set forth in detail by the Supreme Court in its **Stogner** decision (**see** 156 L.Ed.2d at 554), by authorizing the courts to "receiv[e] evidence . . . which the courts of justice would not [previously have] admit[ted] as sufficient proof of a crime." **Stogner, supra,** 156 L.Ed.2d at 555.

The United States Magistrate Judge wrongly concluded that Tallmadge's conviction was not affected by the Supreme Court's decision in **Stogner** (MRR, p.8) and petitioner strongly objects to the Magistrate Judge's conclusion and improper analysis under **Stogner v. California**. As the Supreme Court said in **Stogner, supra,** 156 L.Ed.2d 544, 554:

> "Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. See **United States v. Marion**, 404 U.S. 307, 322, 30

> L.Ed.2d 468, 92 S.Ct. 455 (1971). And that judgment typically rests, in large part, upon evidentiary concerns – for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable. **United States v. Kubrick**, 444 U.S. 111, 117, 62 L.Ed.2d 259, 100 S.Ct. 352 (1979); 4 W. LaFave, J. Israel, & N. King, Criminal Procedure § 18.5(a), p.718 (1999); Wharton, Criminal Pleading and Practice § 316, at 210."

Stogner, 156 L.Ed.2d at 554. Further, it is helpful to note that the Supreme Court did not decide that extensions of **unexpired** statutes of limitations did not violate the **Ex Post Facto Clause**, as the Magistrate Judge infers, the Supreme Court merely notes that "[E]ven where courts have upheld extensions of **unexpired** statutes of limitations (extensions that our holding today does not affect (citation ommitted)), they have consistently distinguished situations where limitations periods have **expired**. **Stogner**, 156 L.Ed.2d at 556.

THIRD OBJECTION

Petitioner Tallmadge objects to the United States Magistrate Judge's determination that he has no basis to rely on **Stogner** to justify his late filing of the habeas corpus petition and the Magistrate Judge's erroneous determination that the **Stogner** opinion "neither removed a State created impediment, gave petitioner a retroactively applied constitutional right, nor made it possible for petitioner to discover the factual predicate for any of the claims in the Petition, i.e., Grounds One through Five." The petitioner also objects to the conclusions of the United

States Magistrate Judge in footnote 6. (MRR, pp. 8-9 and footnote 6, p.9).

The previous two objections addressed the applicability of **Stogner** to petitioner's conviction. However, the Magistrate Judge bases his opinion on his reading of 28 U.S.C. § 2244(d)(1) and certain California Appeals Court decisions construing §§ 1101(b) and 1108 of Cal. Evidence Code, and arrives at the conclusion that petitioner's Petition is untimely and barred under the AEDPA's one year statute of limitations.

First, it is necessary to point out the fact that if the **Stogner** decis[illegible] is applicable to any claim raised by Tallmadge, as petitioner has shown that it is, his habeas petition is timely filed. **Stogner** is a statutory construction decision and statutory construction decisions are always retroactive on the initial collateral review petition. **Rivers v. Roadway Express, Inc.**, 511 U.S. 298, 114 S.Ct. Rptr. 1510, 128 L.Ed.2d 274 (1994).

Moreover, the time-limitation of one-year in which to bring to bring [sic] a habeas action under the AEDPA's amendments is extended by the amendment's provisions contained in 28 U.S.C. § 2244(d)(1)(B)(C) and (D). The Magistrate Judge did not apply the fourth category of Justice Chase's ex post facto laws, as set forth by the Supreme Court in **Stogner**, to the application of Cal. Evidence Code §§ 1101(b) and 1108(b) that permitted the introduction of evidence of alleged offenses for which the statute of limitations had expired, **in order to convict** Tallmadge; which violated the Constitution's **Ex Post Facto Clause**, Art. 10, § 1, cl. 1), under Justice Chase's fourth category, as this evidence was admitted under the authority of § 803(g), Cal. Penal Code, under which

Tallmadge's prosecution was brought. If the application of the statute to unconstitutionally extend the statute of limitations for offenses for which the statute of limitations had expired violated the Constitution's Ex Post Facto Clause, certainly evidence introduced in that prosecution of alleged offenses for which the statute of limitations had expired was, **a fortiori**, a violation of the Constitution's **Ex Post Facto Clause** under Justice Chase's fourth category, as explored by the Supreme Court in **Stogner**, 156 L.Ed.2d at 554-555.

The Supreme Court, in **Stogner**, set forth the 4th category of **ex post facto** laws that violate the Constitution in the following terms:

> "4th. **Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.** All these, and similar laws, are manifestly unjust and oppressive."

Stogner, 156 L.Ed.2d at 552 (citing **Calder v. Bull**, 3 Dall. 386 at 390-391).

This is precisely what §§ 1101(b) and 1108(b), Cal. Evidence Code, do as applied to Tallmadge via the operation of § 803(g), Cal. Penal Code, whose application in allowing prosecution of crimes for which the statute of limitations had expired was found to be unconstitutional under Justice Chase's second category of **ex post facto laws**:

> "2d. **Every law that aggravates a crime, or makes it greater than it was, when committed.**"

Stogner, 156 L.Ed.2d at 552 (citing **Calder v. Bull**, 3 Dall. 386 at 390-391). Further, the Supreme Court said that:

> "In finding that California's law falls within the literal terms of Justice Chase's second category, we do not deny that it may fall within another category as well. Justice Chase's fourth category, for example, includes any 'law that alters the **legal** rules of **evidence**, and receives less, or different, testimony, than the law required at the time of the commission of the offence, **in order to convict the offender**.'" **Stogner**, 156 L.Ed.2d at 554 (citing **Calder v. Bull**, 3 Dall. 386 at 390).

California Penal Code § 803(g), as applied to Tallmadge, admitted evidence relating to sexual acts with **Michelle Z.**, that allegedly occurred in **1987**, more than six years **before** § 803(g) itself was enacted (January 1, 1994). Even more egregious, the operation of § 803(g) permitted evidence of alleged sexual acts with **Deborah B.** that allegedly occurred in **1966**, when the statute of limitations was three years, to be introduced **to convict the offender** [Tallmadge] under Cal. Evidence Code §§ 1101(b) and 1108(b), Cal. Evidence Code, which were never charged. These alleged acts occurred **27** years before Tallmadge's trial and the incidents described were based solely on the witness' memory. Nothing was written down and no police records were prepared (Pet. Appendix, pp. 96-121). The six-year statute of limitations had also expired prior to the enactment of § 803(g), Cal. Penal Code, for the alleged sexual acts that occurred involving Tallmadge and **Marylee M.** (1985); **Susana J.**, (1984); and **Danielle T.**, (1982). The conduct allegedly involving Tallmadge and **Danielle T.** was reported in a complaint

filed **12** years after the statute of limitations established by § 800, Cal. Penal Code, had expired.

The application of § 803(g), Cal. Penal Code, which permitted alleged sexual acts between **Michelle Z.** and Tallmadge, **in order to convict** Tallmadge, violated the Constitution's **Ex Post Facto** Clause, Art. 1, § 10, cl. 1, and falls squarely within the fourth category of **ex post facto** laws set forth by the Supreme Court in **Stogner, supra**, 539 U.S. ___, 156 L.Ed.2d 544, 552, 554, by authorizing the Tallmadge court to "receiv[e] evidence . . . which the courts of justice would not [previously have] admit[ted] as sufficient proof of a crime." **Stogner, supra**, 156 L.Ed.2d at 555. After expiration of the six-year statute of limitations in the instances describing the alleged conduct between **Michelle Z., Marylee M., Susana J.**, and **Danielle T.**, all acts allegedly occurring **before** the enactment of § 803(g), Cal. Penal. Code, in January, 1994, the courts of justice would not have admitted **any** of this evidence "as sufficient proof of a crime." It is absurd that the Magistrate Judge would suggest that because in California "no specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible" under California Evidence Code section 1108, that the Constitution's **Ex Post Facto** clause is irrelevant. (MRR, p.9, fn 6).

It is even more bizarre to suggest, as the Magistrate Judge does, that conduct that could not be charged or admitted as sufficient proof of a crime, could nevertheless be constitutionally admitted to **prove** that Tallmadge committed sexual crimes **after** the statute of limitations for its own admission as sufficient proof of a crime had expired. This would effectively render the **Ex Post Facto**

Clause of the Constitution meaningless and make all statutes of limitations completely irrelevant.

The **Stogner** Court, citing **United States v. Marion**, 404 U.S. 307, 322, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971), said that: "[A] statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." **Stogner**, 156 L.Ed.2d at 554. Even more significant, perhaps, was the Court's statement that, "[S]ubtle **ex post facto** violations are no more permissible than overt ones." **Stogner**, 156 L.Ed.2d at 555 (citing **Cummings v. Missouri**, 4 Wall 277, 329, 18 L.Ed. 356 (1867) (The Ex Post Facto Clause "cannot be evaded by the form in which the power of the State is exerted").

Here, the United States Magistrate Judge would allow the State of California to evade the Constitution's **Ex Post Facto Clause** by the simple expedient of not placing any limitations on the admission of evidence of criminal acts, for which prosecution is time-barred,in its Evidence Code. This is indeed a subtle **ex post facto** violation and no more permissible than overt ones; to quote **Stogner**.

The admission at Tallmadge's trial of evidence of sexual conduct for which the prosecution of was time-barred involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States in **Stogner**. **See** 28 U.S.C. § 2254(B)(i)(d)(1). The court should not adopt the Magistrate Judge's Report and Recommendation on this basis.

FOURTH OBJECTION

The petitioner objects to the Magistrate Judge's recommendation that the habeas corpus petition be dismissed with prejudice on statute of limitations grounds, for all the reasons stated above. The California statutes whose constitutionality is being challenged on **Ex Post Facto** grounds by Tallmadge, Cal. Penal Code § 803(g) and Cal. Evidence Code §§ 1101(b) and 1108(b) have been unconstitutionally applied to Tallmadge and the application of **Stogner** to Tallmadge's claims should be open to review in State courts pursuant to the decision in **Stogner**, should Tallmadge wish to press his claims there, without being deprived to return to federal court on a first petition rather than a second or successive petition under 28 U.S.C. § 2244.

Further, since statute of limitations grounds are jurisdictional and the District Court should not dismiss with prejudice any claim over which it claims a lack of jurisdiction. The Petition should, if necessary, be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the District Court reject the Report and Recommendation of the United States Magistrate Judge and grant the Petition for Writ of Habeas Corpus.

Respectfully submitted,

/s/ Robert E. Sutton
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Wisconsin State Bar No. 1008459

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WALTER DAVID TALLMADGE,

Petitioner,

vs.

Case No.

MIKE KNOWLES, Warden,

Respondents.

The Attorney General of the State of California

**PETITION UNDER 28 U.S.C. § 2254
FOR A WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

NOW COMES Walter David Tallmadge, Petitioner, by his attorneys, Robert E. Sutton, S.C. by Robert E. Sutton, and Albert E. Wehde, and pursuant to 28 U.S.C. § 2254 petitions the Court for a Writ of Habeas Corpus. Petitioner

is being held in restraint of his liberty by the respondent and in violation of the Constitution and laws of the United States. An intervening change in the law, as announced by the United States Supreme Court in *Stogner v. California,* 123 S.Ct.Rptr. 2446, 156 L.Ed.2d 544, 539 U.S.___ (2003), renders petitioner's conviction unlawful and subject to collateral attack. The justification for petitioner's unlawful restraint and confinement by the respondent is a Judgment of Conviction entered by the Superior Court of California, Los Angeles County, Hon. Robert T. Altman, Presiding Judge, entered on July 8, 1997, following petitioner's conviction by jury of 15 counts of sexual abuse against minors: (Judgment and Commitment, Appendix pp. 1-2)

Petitioner was sentenced to a total term of 265 years in state prison and is currently in the custody and control of the respondent at the Mule Creek State Prison, within the statutory and territorial jurisdiction of this Court, and unlawfully restrained of his liberty.

PETITION

1. Judgment and conviction was entered by the Superior Court of California, County of Los Angeles, West Judicial District, Santa Monica, California.

2. Judgment of conviction was entered on July 8, 1997, following jury verdict entered on June 17, 1997.

3. The length of sentence was 265 years in State prison and Ten Thousand Dollars ($10,000.00) restitution.

4. Nature of offense involved (all Counts): Counts 1 and 3 through 5 charged Lewd Acts With Duress (Cal. Penal Code Sec. 288); Count 2 charged Continuous Sexual

Abuse (§ 288.5); Count 6, Rape (§ 261, (a)(2)); Counts 7 and 9 charged Oral Copulation With Duress of a Person Under Age 14 (§ 288(c)); Count 8 charged Genital Penetration By a Foreign Object With Duress (§ 289, sub. (a)); Count 10 charged Continuous Sexual Abuse (§ 288.5); Counts 12 through 16 charged Lewd Acts With Duress Upon a Child (§ 288, subd. (b)). As to each Count, defendant-petitioner was alleged to have had a prior conviction for indecent behavior with a child within the meaning of the Three Strikes Law and § 677, sub. (a)(1), Cal. Penal Code. It was further alleged and the jury found that during the commission of Counts 12 and 13 defendant-petitioner personally used a firearm (§ 1202.3, Cal. Penal Code). (**Informations** attached as Appendix, pp. 3-47)

5. Defendant-petitioner entered a Not Guilty plea to each Count of the indictment.

6. Defendant-petitioner had a jury trial.

7. Defendant-petitioner did not testify at trial.

8. Defendant-petitioner appealed from the judgment of conviction.

9. Appeal was taken to the Court of Appeal of California, Second Appellate District. The Court of Appeal affirmed the judgment in Case No. B115212. (Sup.Court No. SA02401) in an unpublished opinion filed June 15, 1999. A copy of the unpublished opinion is attached to this Petition as Appendix, pp. 48-94)

The grounds raised on appeal were:

> (1) The trial court committed reversible error when it admitted evidence of sexual misconduct not charged in the Information.

(2) The trial court committed reversible error in failing to grant appellant's motion for mistrial.

(3) The trial court erred in finding appellant's prior Wisconsin conviction a strike for the purpose of enhancing his sentence.

(4) The waiver of a potential conflict of interest was ineffective.

10. Further review of the appeals court decision was sought in the California Supreme Court by a Petition for Review.

11. A copy of the California Supreme Court's Denial of Review in Sup. Ct. No. S080532, entered September 29, 1999, is attached to this Petition as Appendix, p. 95.

The grounds for review raised in the California Supreme Court were:

(1) Did the trial court commit reversible error when it admitted misconduct not charged in the Information?

(2) Did the trial court commit reversible error when it failed to grant appellant's motion for a mistrial based upon testimony that identified lead counsel for appellant as a prostitution customer?

12. Defendant-petitioner did not file a petition for certiorari in the United States Supreme Court.

13. No petition for certiorari having been filed, there is no United States Supreme Court decision.

14. No other petitions, applications, or motions, other than a direct appeal from the judgment of conviction

and petition for review have been filed with respect to this judgment in any court, state or federal.

15. The defendant-petitioner contends that he is being unlawfully held on the following grounds:

A. Ground One:

Count 1 of the Information filed on March 27, 1996 and charging the defendant-petitioner, Walter David Tallmadge, with the crime of Forcible Lewd Act Upon Child, in violation of Cal. Penal Code § 288(b), was clearly outside of the six year statute of limitations established by Cal. Penal Code § 800 because the Information alleged that the charged act occurred on or about December 23, 1989. The Information charging defendant Tallmadge was filed on March 27, 1996 and is clearly beyond the six year limitation period established by § 800 by three months.

Supporting Facts: Count 1 of the Information, filed on March 27, 1996 in the Superior Court of Los Angeles County, charged that:

> "On or about December 23, 1989, in the County of Los Angeles, the crime of Forcible Lewd Act Upon Child, in violation of Penal Code Section 288(B), a Felony, was committed by Walter David Tallmadge, who did willfully, unlawfully, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of Michelle Z., a child under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant(s) and the said child, by force, violence, duress, menace, and threat of great bodily harm. . . . "

Although the filing of the Information on March 27, 1996 was clearly in excess of the six year statute of limitations established by Cal. Penal Code § 800 by three months, the application of § 803 Cal. Penal Code, extending the statute of limitations' time limits for certain victims of certain sex crimes, unconstitutionally allowed defendant-petitioner to be prosecuted for a crime for which the relevant statute of limitations had already expired when the Information was filed.

The application of § 803 Cal. Penal Code extending a limitations period which had already expired has since been declared unconstitutional, as a violation of the Constitution's Ex Post Facto Clause, Art. I, § 10, cl. 1, by the United States Supreme Court in *Stogner v. California,* 123 S.Ct.Rptr. 2446, 156 L.Ed.2d 544, 539 U.S.___ (2003).

This intervening change in the law renders petitioner's conviction on Count 1 subject to collateral attack by Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, as set forth more fully in the Memorandum of Law accompanying this Petition for Habeas Corpus relief under 28 U.S.C. § 2254.

B. <u>Ground Two:</u>

Count 2 of the Information flied on March 27, 1996 and charging the defendant-petitioner, Walter David Tallmadge, with the crime of Continuous Sexual Abuse, in violation of Cal. Penal Code § 288.5, was clearly outside of the six year statute of limitations established by § 800 Cal. Penal Code because the Information alleged that the charged acts occurred **on** and between December 24, 1989 and June 30, 1991. The Information, filed on March 27, 1996, charged defendant-petitioner in Count 2 with an act

or acts occurring **on** December 24, 1989 which is clearly beyond the six year limitation period for bringing a charge established by § 800 Cal. Penal Code by three months.

Supporting Facts: Count 2 of the Information, filed on March 27, 1996 in the Superior Court of Los Angeles County, charged that:

> "On and between December 24, 1989 and June 30, 1991, in the County of Los Angeles, the crime of Continuous Sexual Abuse, in violation of Penal Code Section 288.5, a Felony, was committed by Walter David Tallmadge, who did willfully and unlawfully engage in three and more acts of 'substantial sexual conduct', as defined in Penal Code section 1203.066(b), and three and [sic] more acts in violation of Section 288 with MICHELLE Z., a child under the age of 14 years, while the defendant resided with, and had recurring access to the child." (Emphasis supplied)

The filing of the Information on March 27, 1996, charging the defendant-petitioner with an act or acts occurring on and between December 24, 1989 and June 30, 1991 in violation of Penal Code § 288.5, was clearly outside the six year statute of limitations established by Cal. Penal Code § 800, by three months. The application of § 803 Cal. Penal Code extending the statute of limitations' time limits for certain victims of certain sex crimes, unconstitutionally allowed defendant-petitioner Tallmadge to be prosecuted for a crime for which the statute of limitations had expired when the Information was filed.

The application of § 803, Cal. Penal Code, extending a limitations period which had already expired has since been declared unconstitutional, as a violation of the Constitution's Ex Post Facto Clause, Art. I, § 10, cl. 1, by

the United States Supreme Court in *Stogner v. California,* 123 S.Ct.Rptr. 2446, 156 L.Ed.2d 544, 539 U.S.___ (2003) and the intervening change in the law renders petitioner's conviction on Count 2 subject to collateral attack by Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, as set forth more fully in the Memorandum of Law accompanying this Petition for Habeas Corpus relief under 28 U.S.C. § 2254.

C. Ground Three:

The unconstitutional application of §§ 1101(b) and 1108, Cal. Evidence Code, permitted by the trial court, allowed the introduction of evidence of other crimes not charged in the Information that were beyond the statute of limitations; which allowed the prosecution to make an end-run around the statute of limitations established by Cal. Penal Code § 800, in violation of Due Process and Equal Protection.

Supporting Facts:

a. The trial court allowed witness Deborah B., a 38 year-old woman, to testify to incidents of sexual conduct between her and defendant-petitioner that occurred in 1966; when Deborah B. was 9 years old. The incidents described by Deborah B. occurred 27 years before the trial and were uncharged and based solely on the witness' memory. Nothing was written down and no police records were prepared (Tr. pp. 435-460, attached hereto as Appendix, pp. 96-121). Such sexual conduct, had it been charged in the Information, would have been at least 26 years outside the statute of limitations established by Cal. Penal Code § 800. However, the trial court allowed this evidence of other crimes to be admitted at petitioner's trial under

§§ 1101(b) and 1108, Cal. Evidence Code; thereby allowing an unconstitutional end-run around the statute of limitations. The age of the matter testified to precluded any possibility of meaningful cross-examination of the witness, as did the absence of any written material or police records.

b. Michelle Z.

Although Counts 1 through 9 start with Michelle Z. at age 12 (1989), the testimony about sex acts begin as early as age 8 or 9 (1985-1986) and such acts are clearly outside the six year statute of limitations authorized by Cal. Penal Code § 800 and could only have been allowed by the unconstitutional application of Cal. Penal Code § 803 to extend the statute of limitations' time limits, for certain victims of certain sex crimes, which had already expired (Tr., p. 232-287, Appendix, pp. 122-177), or by the unconstitutional application of §§ 1101(b) and 1108, Cal. Evidence Code, permitting evidence of other crimes not charged in the Information that were beyond the statute of limitations; and thereby allowing the prosecution to make an end-run around the statute.

c. Susana J.

Susana J., who was 17 ½ years old when the consensual sexual acts with defendant-petitioner occurred and was age 29 at the time of trial, and whose testimony concerning her sexual conduct with Tallmadge, for which he was convicted of statutory rape in 1987, was beyond the statute of limitations of six years established by § 800, Cal. Penal Code. (Tr., pp. 461-480, Appendix, pp.178-197) This testimony was allowed under Section 1101(b), Evidence Code, although defendant-petitioner's sexual misconduct with Susana J. was with a factually consenting 17 ½ year

old and under § 1101(b), Evidence Code, there must be sufficient similarity to support an inference that the uncharged misconduct and the charged offense are manifestations of a common design or plan. Sexual intercourse with Susana J. was Statutory Rape. Sexual misconduct with victims Michelle Z. and Loren T. is Child Molestation; a crime with a different design or plan which is not common to Statutory Rape. Section 1108(a), Evidence Code, allows for the admission of evidence of other sexual offenses to show character except where such evidence creates a substantial danger of undue prejudice. (Section 352, Evidence Code). The admission of testimony of acts beyond the statute of limitations established by § 800, Cal. Penal Code, under either § 1101(b) or 1108(a), Evidence Code, is an unconstitutional violation of the Ex Post Facto Clause, Art. I, Sec. 10, cl. 1, of the Constitution and violates petitioner's right to due process and equal protection under the 14th Amendment.

d. Marylee M.

Marylee M. was born on November 4, 1969 and was age 15 (1985) when defendant-petitioner allegedly had her carry out an act of masturbation, without sexual intercourse (Tr. pp. 510-550, Appendix, pp.198-238) an act which was clearly beyond the statute of limitations established by Cal. Penal Code § 800. This evidence of an uncharged attempted seduction of a 15 ½ year old consenting female failed to prove any material fact that would allow it to be considered under 1101(b) or 1108(a), Evidence Code, as relevant evidence of other crimes (the continuous molestations of victims Michelle and Loren, minors under the age of 14 years, or as evidence of the character of a child molester). The unconstitutional application of §§ 1101(b) and 1108(a) permitted by the trial

court allowed evidence of an uncharged crime beyond the statute of limitations established by § 800 Penal Code and violated the Ex Post Facto Clause, Art. 1, § 10, cl. 1, of the Constitution; and such application permitted an end-run around the statute of limitations.

e. Danielle T.

Danielle T. was 27 years old (D.O.B. 1/10/70) in March, 1997, when she told a police officer, for the first time, that defendant-petitioner had sexually molested her some 15 years earlier. The complaint to police was made 12 years after the statute of limitations established by § 800, Cal. Penal Code, had expired. This alleged sexual conduct was uncharged in the Information and would not have been unavailable to the prosecution under § 800 or § 803 of the Penal Code [even if § 803 had not been found unconstitutional] but was admitted by the trial court as other crimes evidence under Evidence Code §§ 1101(b) and 1108; which unconstitutional application allowed an end-run around the statute of limitations, and allowed defendant-petitioner to be convicted on the basis of uncorroborated acts, too remote in time to fall within the statute of limitations or to be relevant to the crimes charged in the Information or not unduly prejudicial to the defendant-appellant.

In the case of Danielle T, no early police reports were ever generated and no prosecution ensued. Therefore, there was no defense investigation at or near the time of the alleged crimes, which would have been crucial in determining the accuracy of the allegations or the credibility of Danielle T. There was not any evidence that Danielle T. ever told anyone of the allegations prior to March, 1997, or that the defendant was ever aware of the allegations

prior to that time. (There is no currently available transcript of Danielle T.'s testimony). The trial court unconstitutionally applied §§ 1101(b) and 1108, Evidence Code, in admitting Danielle T.'s other crimes evidence that occurred outside the statute of limitations established by § 800, Penal Code; thereby causing a violation of Art. I. § 10, cl. 1, of the Constitution. Section 1108(a), Evidence Code, allows for the admission of evidence of other sexual offenses to show character except where such evidence creates a substantial danger of undue prejudice. (Section 352, Evidence Code) Admission of testimony of acts beyond the statute of limitations established by § 800, Cal. Penal Code, under either § 1101(b) or 1108(a), Evidence Code, is an unconstitutional violation of the Ex Post Facto Clause, Art. I, Sec. 10, cl. 1, of the Constitution and violates petitioner's right to due process and equal protection under the Fourteenth Amendment.

D. Ground Four:

The trial court committed error when it failed to grant defendant-petitioner's motion for a mistrial based upon testimony that identified lead counsel for appellant as a prostitution customer, thereby creating a conflict of interest between attorney and client.

Supporting Facts: During direct examination of Laura Tallmadge, the mother of victim Loren Tallmadge, in this case, the witness made a highly prejudicial outburst that damaged irreparably the credibility of defense counsel Leonard Levine. Laura Tallmadge, having been caught in a lie when she testified that she had first met defendant-petitioner at his place of business, offered the "observation" that defense counsel [who was interrogating

her] had previously been a customer of hers at a massage parlor where she worked, and where she had initially met the defendant-petitioner. Laura Tallmadge actually blurted out something to the effect of "yeah, just like you [referring to defense counsel] were my customer."

Counsel was placed in a Catch-22 position: If the statement that Laura Tallmadge made was true, counsel could not effectively advocate for or represent the defendant-petitioner because his credibility before the jury would have been seriously damaged by the fact that he was a customer of his client's wife at a massage parlor, or for possible fear of further revelations during his examination of the witness. If false, there was no way to convince the jury of this to the extent that the credibility of defense counsel would have been restored sufficiently to guarantee defendant-petitioner a fair trial.

The Court recognized this damage to defense counsel's credibility and declared that it would likely declare a mistrial if the defendant so moved. However, after rethinking its position, the Court indicated that it believed that an admonishment to the jury would be sufficient to cure any injury to defense counsel's credibility. However, since the effect of the witness' outburst could not be measured, it was error for the trial court not to have declared a mistrial upon defendant's request and failure to do so effectively denied the defendant-petitioner the right to a fair trial. Defendant-petitioner repeated his request for a mistrial by formal motion to the trial court on July 7, 1997.

E. <u>Ground Five:</u>

Counsel provided ineffective assistance by failing to challenge the first two Counts of the Information as being

beyond the statute of limitations and also for failure to challenge the application of §§ 1101(b) and 1108(a) as unconstitutionally permitting the extension of the statute of limitations by authorizing the admission of other crimes evidence which was, itself, beyond the statute of limitations established by § 800, Cal. Penal Code.

Supporting Facts: Although counsel challenged the admission of other crimes evidence as not complying with the requirements of §§ 1101(b) and 1108(a), counsel failed to challenge the constitutionality of the statutes as permitting prosecution for offenses by admission of evidence relating to acts occurring outside of the relevant statute of limitations and thereby unconstitutionally extending that statute. There would be no purpose in having a statute of limitations where offenses charged outside its relevant periods, could, in effect, be prosecuted on the basis of uncharged conduct occurring beyond the limitations period established under the statute. This result is absurd on its face and invites statutory ambiguity. Failure to challenge this obvious constitutional violation renders counsel's assistance ineffective.

16. Defendant-petitioner did not present the grounds listed in 15, Ground One, due to ineffective assistance of counsel and because the application of § 803, Cal. Penal Code, extending the statute of limitations' time limits for certain victims of certain sex crimes, had not been declared unconstitutional at the time he sought direct review of his conviction. An intervening change in the law, occasioned by the United States Supreme Court's decision in *Stogner v. California,* 123 S.Ct.Rptr. 2446, 156 L.Ed.2d 544, 539 U.S.___(2003), made this ground for relief available to defendant-petitioner and rendered his conviction subject to collateral attack.

Defendant-petitioner did not present the grounds listed in 15, Ground Two, for the reasons stated above. The intervening change in the law cited above also made this ground for relief available and defendant-petitioner's conviction subject to collateral attack.

Defendant-petitioner did not present the grounds listed in 15, Ground Three, as a constitutional challenge due to ineffective assistance of counsel and because the application of § 803, Penal Code, which allowed the extension of the statute of limitations authorized by § 800 Penal Code, for certain victims of certain sex crimes, to crimes for which the statute of limitations had expired had not been declared unconstitutional.

Defendant-petitioner did not present the grounds listed in ¶ 15, Ground Five, because he was represented on direct review by trial counsel and counsel was under no obligation to raise the issue of his own ineffectiveness on direct review. An additional reason was that the effect of Cal. Penal Code § 803's extension of the limitations period established by § 800, Penal Code, and its effect on evidence of uncharged conduct introduced under §§ 1101(b) and 1108 had not been rendered subject to collateral attack by an intervening change in the law.

17. Defendant-petitioner does not have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack.

18. The names and addresses of each attorney that represented defendant-petitioner at the following stages of the judgment under attack are as follows:

(a) Preliminary Hearing: Leonard Levine and Charles Weedman

(b) Arraignment and Plea: Leonard Levine and Charles Weedman

(c) Trial: Leonard Levine and Charles Weedman

(d) Sentencing: Leonard Levine and Charles Weedman

(e) On Appeal: Charles Weedman

(f) In any post-conviction proceeding: Charles Weedman

The addresses of the above counsel are:

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19. Defendant-petitioner was sentenced on 15 Counts of a single Information in the same court and the same time.

20. Defendant-petitioner does not have any future sentence to serve after completion of the sentence imposed by the judgment under attack.

Relief Sought

Petitioner remains imprisoned, in the custody of the respondent, and deprived of his liberty in violation of his rights under the Fourteenth Amendment and the Ex Post

Facto Clause, Art. I, § 10, cl. 1, of the Constitution. It is this unlawful confinement and restraint of liberty that petitioner now complains of and for which he seeks redress in this Petition for Writ of Habeas Corpus.

WHEREFORE, petitioner prays that a Writ of Habeas Corpus issue herein directed to Mike Knowles, Warden of the Mule Creek State Prison, ordering that petitioner be brought before the Court that he may be discharged from imprisonment and further restraint of his liberty by the respondent and that the judgment of conviction be vacated in the instant case.

Dated this 12th day of September, 2003.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WALTER DAVID TALLMADGE,

Petitioner,

vs. Case No.

MIKE KNOWLES, Warden,

Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

Petitioner, Walter David Tallmadge, respectfully submits the following Memorandum of Law in support of his petition for a Writ of Habeas Corpus challenging his unlawful confinement by the Respondent, Mike Knowles, Warden, said confinement being in violation of the Constitution and laws of the United States.

ARGUMENT

Petitioner is being unlawfully confined and restrained of his liberty by the Respondent, Mike Knowles, Warden of the Mule Creek State Prison, pursuant to a judgment of the Superior Court of California, Los Angeles County, which was imposed in violation of the United States Constitution. The recent decision of the United States Supreme Court in *Stogner v. California,* 123 S.Ct. 2446, 156 L.Ed.2d 544, 539 U.S. ___ (2003), renders the Judgment of the Superior Court of California, under which petitioner is being confined by the respondent, subject to collateral attack due to an intervening change in the law.

Collateral relief is available to a state prisoner to challenge a Judgment of a state court where the state court's decision was " . . . Contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under *Davis v. United States,* 417 U.S. 333, 94 S.Ct. 2288, 41 L.Ed.2d 109 (1974), the United States Supreme Court's decision in *Stogner v. California, supra,* constituted intervening controlling authority that renders petitioner's conviction and punishment, for conduct that was beyond the applicable statute of limitations at the time the Information was filed, in violation of the Ex Post Facto Clause, Art. I, § 10, cl. 1 of the Constitution, entitling him to Habeas relief under 28 U.S.C. § 2254.

As explained by the Supreme Court in *Teague v. Lane,* 489 U.S. 288 (1989), "A case announces a new rule when it breaks new ground or imposes a new obligation on the States or Federal Government" or, put differently "A case announces a new rule if the result was not dictated by

precedent existing at the time the defendant's conviction became final." *Teague,* 489 U.S. at 301, 109 S.Ct. at 1070.

In the instant case, counsel lacked the tools to represent a constitutional challenge to the Information, charging Counts that were outside the statute of limitations established by § 800, Cal. Penal Code, because § 803, Penal Code, extended the time limits for certain victims of certain enumerated sex crimes where the limitations period had expired. The Supreme Court, in *Stogner,* found this statutory scheme to be repugnant to the Constitution's Ex Post Facto Clause, Art. I, § 10, cl. 1, as it allowed prosecution of crimes for which the statute of limitations had expired.

The Supreme Court's decision in *Stogner* is now controlling authority; effectively overruling the California Supreme Court's decision in *People v. Frazer,* 88 Cal.Rptr.2d 312, 982 P.2d 180 (Cal. 1999), which had held that § 803, Penal Code, permitting prosecution for lewd conduct against children to be commenced within one year after an independently corroborated report by the victim, even though the fixed six-year limitations period [under § 800, Penal Code] had expired, did not offend the Constitution's Ex Post Facto Clause.

The United States Supreme Court has also held that an intervening change of law is sufficient justification for failing to raise a claim. *Sanders v. United States*, 373 U.S. 1, 10 L.Ed.2d 148, 83 S.Ct. 1068 (1963). In the instant case, the legal basis for petitioner's claims in Grounds One, Two, Three and Five were not reasonably available to him until the Supreme Court's decision in *Stogner* and constitutes cause for failure to raise these claims in the

state courts. Ground Four was exhausted in the state courts.

Count One of the Information, filed March 27, 1996, charged the petitioner, Walter David Tallmadge, with committing "on or about December 23, 1989, in the County of Los Angeles, the crime of Forcible Lewd Act Upon Child, in violation of Penal Code Section 288(B)(sic), a Felony. . . . " The filing or the Information on March 27, 1996 was clearly outside the six-year limitations period established under § 800, Penal Code, by several months. However, the application of §803, Penal Code, extending the statute of limitations' time limits for certain victims of certain sex crimes, unconstitutionally permitted petitioner to be prosecuted for a crime for which six-year limitations period had expired when the Information was filed. The application of § 803, Penal Code, permitting the extension of the six-year statute of limitations after the limitations period had expired, violated the Constitution's Ex Post Facto Clause, Art. 1, § 10, cl. 1, as determined by the Supreme Court in *Stogner, supra,* and renders petitioner's conviction subject to collateral attack pursuant to 28 U.S.C. §2254.

The application of § 803, Penal Code, allowing the extension of the time limits established under § 800, Penal Code, to permit prosecution of petitioner on Count One of the Information was " . . . Contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States [in *Stogner*]. 28 U.S.C. § 2254(d)(1). The state court's decision, and ensuing Judgment, violated the Constitution's Ex Post Facto Clause and petitioner is entitled to habeas relief pursuant to 28 U.S.C. § 2254.

Count Two of the Information, filed March 27, 1996, charged petitioner, Walter David Tallmadge, with committing the crime of Continuous Sexual Abuse "On and between December 23, 1989" in violation of § 288.5, Penal Code (emphasis supplied). The Information, which charged petitioner in Count Two with an act or acts occurring **on** and between December 23, 1989 and June 30, 1991, clearly charged a criminal act or acts that were outside the six-year statute of limitations established by § 800, Penal Code.

In Count Two of the Information, the application of § 803, Penal Code, extending the statute of limitations' time limits for certain victims of certain enumerated sex crimes, unconstitutionally allowed petitioner Tallmadge to be prosecuted for a crime for which the six-year statute of limitations under § 800, Penal Code, had expired when the Information was filed. As in Count One, the application of § 803, Penal Code, to permit prosecution of petitioner for a crime for which the limitations period had expired was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States [in *Stogner*]." The state court's Judgment violates the Constitution's Ex Post Facto Clause, Art. I, § 10, cl. 1, and petitioner is entitled to habeas relief under 28 U.S.C. § 2254. Moreover, the legal basis for asserting the claims presented in Grounds One and Two was not reasonably available to counsel for petitioner until the Supreme Court's decision in *Stogner* established the law petitioner relies on. *See Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 297 (1986), which precluded him from raising the issue presented in Counts One and Two in the state courts.

At the outset, it must be stated that petitioner Tallmadge did not testify at trial. The state court unconstitutionally applied §§ 1101(b) and 1108, Cal. Evidence Code, to permit the introduction of evidence of other crimes not charged in the Information that were, themselves, outside the statute of limitations. The state court thereby allowed the prosecution to make an end-run around the statute of limitations established by § 800 Penal Code. The admission of testimony of acts beyond the statute of limitations established by § 800, Penal Code, under either §1101(b) or 1108(a), Evidence Code, is no less a violation of the Constitution's Ex Post Facto Clause than allowing crimes outside the statute to be charged in the Information. It effectively allows evidence of uncharged crimes to be introduced at trial, where the crimes charged in the Information are themselves beyond the statute of limitations; in violation of due process and equal protection under the Fourteenth Amendment.

a. In the case of Deborah B., the court permitted testimony concerning incidents of alleged sexual conduct between her and the petitioner that she said occurred in 1966, when she was 9 years old. The alleged incidents described by Deborah B. in her testimony occurred 27 years before the trial in petitioner's case. This alleged sexual conduct, had it been charged in the Information, would have been at least 26 years outside the time limits established by the statute of limitations of § 800, Penal Code. However, this testimony would, despite its age, have been admissible under § 803 [which allows evidence of sex crimes against minors occurring **at any time before 1994** (emphasis supplied)]. The evidence of other crimes admitted by the Superior Court of Los Angeles County at petitioner's trial, under §§ 1101(b) and 1108,

allowed the prosecution to make an unconstitutional end-run around the statute of limitations established under § 800, Penal Code. This could not have happened but for the application of § 803, Penal Code, which allowed prosecution of crimes occurring at any time before 1994 and which opened the door for the admission of evidence of uncharged sex crimes under §§ 1101(b) and 1108, Evidence Code, that was outside the six-year limitations period established by § 800, Penal Code. This was a violation of the Ex Post Facto Clause and due process and equal protection under the Fourteenth Amendment of the Constitution.

b. Although Counts 1 through 9 start with Michelle Z. at age 12 (1989), the testimony about sex acts begins as early as age 8 or 9 (1985-86). The acts of sexual misconduct with Michelle Z., that allegedly occurred in 1985-86, when Michelle Z. was 8 or 9, and that allegedly occurred when she was 12 (1989), were clearly outside the six-year statute of limitations authorized by § 800, Penal Code. However, the application of § 803, Penal Code, which unconstitutionally extended the statute of limitations' time limits for certain victims of certain sex crimes, and the application of §§ 1101(b) and 1108, Evidence Code, which permitted evidence of other crimes, not charged in the Information to be admitted that were outside the time limits established by § 800, allowed this conduct to be prosecuted and also allowed evidence of other crimes not charged in the Information that were outside the statute of limitations. This was a violation of the Ex Post Facto Clause, as recently determined by the United States Supreme Court in *Stogner, supra,* that allowed the prosecution to make an end-run around the statute of limitations.

c. Susana J. was 17 ½ years old when the consensual sexual acts with petitioner to which she testified allegedly occurred. She was 29 years old at the time of trial. The alleged sexual conduct between Susana J. and petitioner, for which he was convicted of Statutory Rape in 1987, was clearly outside the statute of limitations of six-years established by § 800, Penal Code. Susana J.'s testimony was allowed under § 1101(b), Evidence Code, although this sexual misconduct was with a factually consenting 17½ year old and under § 1101(b), Evidence Code, there must be sufficient similarity to support an inference that the uncharged misconduct and the charged offense are manifestations of a common design or plan. However, sexual intercourse with Susana J. was Statutory Rape. Sexual misconduct with victims Michelle Z. and Loren T. was Child Molestation; a crime with a design or plan which is not common to Statutory Rape. Further, § 1108, Evidence Code, allows for the admission of evidence of other sexual offenses to show character, except where such evidence creates a substantial danger of undue prejudice. (Section 352, Evidence Code). However, the admission of testimony of acts beyond the statute of limitations established by § 800, Penal Code, under either §§ 1101(b) or 1108, Evidence Code, was a violation of the Ex Post Facto Clause, Art. I, §10, cl. 1, and also violated petitioner's right to due process and equal protection under the Fourteenth Amendment to the Constitution.

d. Marylee M., who also testified at petitioner's trial, was born on November 4, 1969 and was age 15 (1985) when petitioner allegedly had her carry out an act or masturbation on him, without sexual intercourse (RT, pp. 510-550; Attachment ___), which act, if it occurred at all, was uncharged in the Information and clearly beyond the

statute of limitations established by § 800 of six-years. This testimonial evidence of an uncharged attempted seduction of a 15½ year old consenting female failed to prove any material fact that would allow it to have been considered under §§ 1101(b) or 1108, Evidence Code, as relevant evidence of other crimes (the continuous molestation of victims Michelle and Loren, minors under the age of 14 years, or as evidence of the character of a child molester). The application of §§ 1101(b) and 1108, permitted by the trial court, allowed the introduction of an uncharged crime that was, itself, beyond the statute of limitations established by § 800 and violated the Ex Post Facto Clause by unconstitutionally permitting the prosecution to make an end-run around the statute of limitations.

e. Danielle T. was born on January 10, 1970, and was 27 years old in March, 1997, when she told a police officer, for the first time, that petitioner had sexually molested her some 15 years earlier. This complaint to police was made at least 12 years after the statute of limitations established by § 800, Penal Code, had expired. This alleged sexual conduct was not charged in the Information and would not, in fact, have been available to the prosecution under either §§ 800 or 803 of the Penal Code [even had § 803 not been found unconstitutional by the Supreme Court]. However, this alleged sexual conduct between Danielle T. and petitioner was admitted by the trial court as other crimes evidence under §§ 1101(b) and 1108. This allowed an unconstitutional end-run around the statute of limitations and allowed the petitioner to be convicted on the basis of uncorroborated acts that were too remote in time to be within the statute of limitations or to

be relevant to the crimes charged in the Information, or not unduly prejudicial to the petitioner.

Moreover, in the case of Danielle T. no early police reports were ever generated and there was no prosecution. Therefore, there was no defense investigation at or near the time of the alleged crimes, which would have been crucial in determining the accuracy of the allegations or the credibility of Danielle T. There was not any evidence that Danielle T. ever told anyone of the allegations prior to March, 1997, or that petitioner was ever aware of the allegations prior to that time. (There is no currently available transcript of Danielle T.'s testimony.)

The Superior Court unconstitutionally allowed the application of §§ 1101(b) and 1108, Evidence Code, permitting the prosecution to introduce evidence of other crimes that occurred outside the time limitations' period established by §§ 800 and 803, Penal Code. Section 1108, Evidence Code, allows for the admission of evidence of other sexual offenses to show character except where such evidence creates a substantial danger of undue prejudice. (§ 352, Evidence Code). However, admission of testimony concerning acts occurring beyond the statute of limitations established by § 800, Penal Code, under either §§ 1101(b) or 1108, Evidence Code, violates the Constitution's Ex Post Facto Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Petitioner's attack against the constitutionality of §§ 1101(b) and 1108, Evidence Code, as applied in his trial, is set forth more fully infra.

§§ 1101(b) and 1108, Evidence Code, Were Unconstitutionally Applied

An official attack against a law's constitutionality may proceed along four axes: the law may impermissibly burden the [petitioner's] rights; it may impermissibly burden the rights of third parties; it may fail to provide adequate notice of what conduct is prohibited; or it may lack sufficient guidelines to prevent arbitrary and discriminatory enforcement. *IDK, Inc. v. Clark County,* 836 F.2d 1185 (9th Cir. 1988). The application of § 803, Penal Code, to extend the statute of limitations to allow prosecution for crimes for which the limitations' period had expired, has already been held to violate the Ex Post Facto Clause by the Supreme Court in *Stogner v. California, supra,* 123 S.Ct. 2446, 156 L.Ed.2d 544, 539 U.S. ___ (2003). However, the application of §§ 1101(b) and 1108, Evidence Code, by the Superior Court also impermissibly burdened petitioner's rights and failed to provide adequate notice of what conduct was prohibited; as they allowed the introduction of evidence of other crimes, themselves beyond the statute of limitations, that could not have been charged as crimes in the Information. The Supreme Court held that § 803's extension of § 800's six-year limitations period to crimes for which the limitations period had expired violated the Ex Post Facto Clause. *Stogner, surpa* [sic], 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003).

However, absent the unconstitutional application of § 803, Penal Code, extending the statute of limitations time periods for certain victims of certain enumerated sex crimes, the testimony of other offenses occurring outside the statue [sic] of limitations and offered by the prosecution and admitted by the trial court under §§ 1101(b) and 1108,

were many years outside of the six-year statute of limitations under § 800, Penal Code. The California legislature in enacting § 803, Penal Code, effectively overruled the Ninth Circuit's decision in *United States v. Lai,* 944 F.2d 1434 (9th Cir. 1991), which held that admission of evidence of a defendant's prior crimes or wrongful acts, to show bad character or propensity to commit crimes, was prohibited. The passage of § 803 opened the door for the admission of such evidence under § 1108, Evidence Code. The Ninth Circuit had also held that a penal law that is applied retrospectively to the disadvantage of a defendant was an unconstitutional ex post facto law. *Nulph v. Faatz,* 27 F.3d 451 (9th Cir. 1994).

The enactment of § 803, Penal Code, not only allowed retrospective application of statutes of limitations for certain sex crimes, it also allowed an end-run around those statutes by permitting introduction of evidence, under §§ 1101(b) and 1108, of uncharged crimes for which the statute of limitations had expired. In other words, not only could an individual be charged with an offense for which the statute of limitations had expired, the prosecution could also introduce evidence of uncharged crimes for which the statute of limitations had expired; in support of the time-barred charged crimes.

Petitioner respectfully asserts that such an application of § 803, allowing the ex post facto application of § 1101(b) and 1108, constitutes a violation of the Ex Post Facto Clause even more egregious than the violation found by the Supreme Court in *Stogner,* and that also violates due process and equal protection. In order to prevail on a claim for habeas corpus, a state prisoner must show, as petitioner has, that his detention violates the Constitution, a federal statute, or a treaty. *See Mannhalt v. Reed,*

847 F.2d 576 (9th Cir. 1988). Moreover, it is clear that The Supremacy Clause establishes federal law as the supreme law of the land. *United States v. Alaska Public Utilities Comm.,* 23 F.3d 257 (9th Cir. 1994).

The Constitution's Ex Post Facto Clause is unambiguous. A new law may only be [constitutionally] applied to conduct occurring after the date of its enactment. *See, e.g., United Stats* [sic] *v. Tapia,* 981 F.2d 1194 (11th Cir. 1993). Further, the Due Process Clause bars a State from imposing punishment on the basis of an unexpected or unusual interpretation of plain language; as the State of California did in enacting § 803 to permit prosecution of certain sex offenses where the statute of limitations had expired. *See Conner v. Sakai,* 15 F.2d 1463 (9th Cir. 1993). The application of § 803 is even more egregious because it permitted evidence of other crimes to be introduced, pursuant to §§ 1101(b) and 1108, where the statute of limitations for their prosecution had long expired. This effectively takes any sex offense against minors outside the statute of limitations, no matter when it occurred, and permits evidence of it to be introduced at trial.

The State Habeas Claim Presented In Ground Four Is Exhausted

In Ground Four of his petition, petitioner Tallmadge asserts that the trial court committed error when it failed to grant his motion for a mistrial based upon testimony that identified lead counsel in his case as a prostitution customer, thereby creating a conflict of interest between attorney and client. As a threshold matter, under the "exhaustion" principle, a state prisoner must first present all federal claims to state court before the district court

may entertain a federal habeas petition [absent valid excuse]. The basic principle underlying the federal habeas exhaustion requirement is that state courts, like federal courts, have a duty to protect rights secured by the Constitution. *See Jennison v. Goldsmith,* 940 F.2d 1308 (9th Cir. 1991). However, a State habeas claim is considered exhausted when it has been fairly presented to the highest state court. *Schwendeman v. Wallenstein,* 971 F.2d 313 (9th Cir. 1992).

In the instant case, petitioner has presented the claim asserted in Ground Four to the California Supreme Court in a Petition For Review that was denied by that Court on September 29, 1999. This claim has been exhausted and may be considered by this Court. The question to be answered here is whether the trial court's failure to declare a mistrial, upon motion of the defense, denied petitioner his right to a fair trial guaranteed by the Fifth Amendment of the Constitution. The right to a fair trial is a basic requirement of due process. *See Haupt v. Dillard,* 17 F.3d 285 (9th Cir. 1994).

Petitioner has stated the relevant facts in his petition and need not reiterate them in this Memorandum. However, with respect to petitioner's claim that his counsel could not effectively represent him, as counsel's credibility had been seriously damaged by the outburst of the witness, Laura Tallmadge, who alleged that counsel had been a prostitution customer at the same massage parlor where she had met the petitioner, it has long been recognized that any defendant's right to effective assistance of counsel is violated where his attorney has an actual conflict of interest that affects the defendant adversely. *See, e.g., Mathis v. Hood,* 937 F.2d 790 (2nd Cir. 1991).

Laura Tallmadge, while on the witness stand and being questioned by defense counsel, was caught in a lie when she testified that she had first met petitioner at his place of business when she had actually met him at a massage parlor. However, she responded to defense counsel's interrogation by blurting out something to the effect of "yeah, just like you were my customer." This "observation" by witness, Laura Tallmadge, placed counsel in a Catch-22 position. If Laura Tallmadge's statement was true, counsel could not effectively advocate for the petitioner because his credibility before the jury would have been seriously damaged by the fact that he had been a customer of his client's wife at an established place of prostitution; the massage parlor where Laura Tallmadge worked. On the other hand, if the statement was false, there was no meaningful way to convince the jury of this and restore defense counsel's credibility sufficiently to guarantee petitioner a fair trial.

Even more troubling, if Laura Tallmadge's statement was true, counsel's ability to further examine the witness would have been constrained for possible fear of additional revelations that might compromise his reputation or impugn his integrity. The trial court recognized the damage to defense counsel's credibility, expressing its concern regarding "what the jury thinks of [Leonard L.]"[1] The trial court also said that if the jury believed Laura's allegations were true, it could not "help but feel" Leonard L.'s credibility would be undermined with the jury since massage

[1] The quoted portions of the Superior Court's determination of the motion for mistrial is taken from the Court of Appeals' decision of June 15, 1999.

parlors "are places of prostitution as used in the context of these days."

The court also noted, "What makes it doubly bad in this case is that the jury has heard a statement that Mr. [Leonard L.] went to the same prostitute that his own client did." The court stated it was "seriously thinking of granting a motion for a mistrial." The trial court asked Leonard L. whether, after discussing the situation with [petitioner] and [co-counsel Weedman], he was asking for a mistrial. Leonard L. said that [petitioner] was "adamant in his desire for a mistrial." and that [petitioner] "believe[d] far more strongly than I or the Court that [Laura] did it intentionally." Since [petitioner] believed Leonard L.'s credibility with the jury was irrevocably damaged, the defense moved for a mistrial. However, the court believed that an admonishment to the jury would be "more than enough to dispel any kind of problem." The court said that it thought about the situation and "went through all the negative remarks and all the implications of it, and I realize the seriousness of it, and I decided I could cure it. And if I couldn't, I'd grant a mistrial. I thought about it and I decided that what I'm doing is a cure." The court then admonished the jury after denying petitioner's motion for a mistrial.

The court then personally assured the jury there was no truth to Laura Tallmadge's allegations. However, the court allowed the witness to continue testifying in the case. This was a violation of petitioner's due process rights. Offering false testimony is a violation of due process. *McGeshick v. Fiedler*, 3 F.3d 1083 (7th Cir. 1993). Allowing a witness who has offered false testimony that the court knows is false to continue testifying is an abuse of the court's discretion and compounds the violation of

due process. It is impossible for evidence that is not credible in itself to form an overall picture that is both credible and convincing. *Fairchild v. Lockhart,* 979 F.2d 636 (8th Cir. 1992). The witness should have been subjected to prosecution for perjury committed in the presence of the court. On habeas review, the Federal habeas courts ask only whether the constitutional violation infected the state trial. *Pemberton v. Collins,* 991 F.2d 1218 (5th Cir. 1993). In this situation, petitioner's Sixth Amendment right to effective assistance of counsel and his Fifth Amendment right to due process were violated; as the right to a fair trial is a basic requirement of due process. *Haupt v. Dillard, supra,* 17 F.3d 285 (9th Cir. 1994). Petitioner has exhausted this claim and is entitled to habeas relief.

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE

Petitioner's trial counsel provided ineffective assistance by failing to challenge the first two Counts of the Information as being outside the statute of limitations and failing to challenge the application of §§ 1101(b) and 1108 as unconstitutionally permitting the extension of the statute of limitations, by authorizing admission of other crimes evidence which was itself beyond the statute of limitations established by § 800, Penal Code.

Petitioner's counsel challenged the admission of other crimes evidence, as not complying with the requirements of §§ 1101(b) and 1108, but failed to challenge the constitutionality of the application of these statutes allowing prosecution for offenses outside of the relevant statute of limitations based on the admission of evidence

of non-charged crimes; thereby unconstitutionally extending the limitations' period to reach conduct for which the statute of limitations had expired. Time limits imposed by a limitations statute are negated and rendered meaningless where uncharged conduct occurring outside the limitations period can be admitted as evidence in the prosecution of crimes that themselves fall outside the stated limitations period.

The result of this statutory ambiguity invites conflict of laws and is, indeed, absurd on its face. Counsel's ineffective assistance was cause for petitioner's failure to raise this claim in state court. Petitioner's claims are of constitutional magnitude and satisfy the *Strickland v. Washington* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] cause and prejudice standard. "Ineffective assistance of counsel . . . is cause for procedural default." *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 297 (1986). Moreover, counsel is not required to raise his own ineffectiveness on appeal, or at any other time. *See Nichols v. United States,* 75 F.3d 1137 (7th Cir. 1996) (the Seventh Circuit had earlier held that appellate counsel is not required to raise his own ineffectiveness on appeal in order to preserve the claim for collateral review in *Page v. United States,* 884 F.2d 300 (7th Cir. 1989)).

Petitioner also asserts that the application of § 803, Penal Code, permitting prosecution of certain sex offenses for which the statute of limitations had expired, has been declared unconstitutional and implicates the constitutionality of §§ 1101(b) and 1108, Evidence Code, where § 803, Penal Code, the statue [sic] underlying such application, allowed evidence of uncharged "other crimes" that occurred outside the relevant statute of limitations (§ 800, Penal Code) to convict an accused sexual molester, has

been declared unconstitutional. The Ninth Circuit, in *Chambers v. United States,* 22 F.3df 939 (9th Cir. 1994), held that where there was no valid statute on the books prohibiting defendant's conduct, he was entitled to collateral relief on a legally innocent basis. *Id.*

The issue presented here, where the unconstitutional application of one statute permits the unconstitutional application of two other statutes, is a novel constitutional claim. The Supreme Court has held that "where a constitutional claim is so novel that its legal basis [was] not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with acceptable state procedures," when the defendant has demonstrated that his situation is one where a court has "articulated a constitutional principle that has not been previously recognized but which has been held to have retroactive application." *Reed v. Ross,* 468 U.S. 1, 16-17, 104 S.Ct. 2901, 2911, 82 L.Ed.2d 1 (1984). Because, as in the instant case, the legal question at issue was novel, counsel had no reasonable basis for asserting it in accordance with acceptable state procedures. The constitutional rule petitioner relies on did not become established until the Supreme Court decision in *Stogner,* in 2003. *See also Murray v. Carrier, supra,* 477 U.S. at 488 (the Supreme Court observed that "cause" would be established by a showing that (a) the factual or legal basis for a claim was not reasonably available to counsel; . . . ")

In other words, petitioner Tallmadge lacked tools to construct a constitutional challenge to his conviction before the Supreme Court decision in *Stogner,* which is cause for failure to raise his challenge earlier. The *Strickland* standard for both cause and prejudice is satisfied where the Supreme Court has announced a substantive

constitutional rule and declared the application of a statute unconstitutional and where, but for the unconstitutional application of the statute, petitioner would not have been convicted. Habeas corpus relief should be granted and petitioner's conviction vacated and petitioner released from his unlawful confinement by the respondent.

Dated this 12th day of September, 2003.

Respectfully submitted,

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